1991

Sinaitic and Noahide Law: Legal Pluralism in Jewish Law

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INTRODUCTION

One of the more intriguing examples of legal pluralism in a religious legal system is the coexistence of two distinct legal orders in Jewish law: the Noahide and the Sinaitic. According to Jewish legal doctrine, before the theophany at Sinai, the Noahide Code governed all humanity. At Sinai, God gave Jews their own legal system. Non-Jews were to govern themselves in accordance with the Noahide Code. This Code consists of six prohibitions against bloodshed, theft, sexual immorality, blasphemy, idolatry, eating a limb torn from a live animal and a seventh law, *dinin*, requiring the establishment of courts and, according to some interpretations, the adoption of a civil legal code. These seven commandments are headings for a detailed body of rabbinic legislation that defines the obligations of non-Jews, often in terms markedly different from the obligations of Jews. The presence of these two disparate legal systems within the larger system of Jewish law poses an interesting problem of legal ordering. How does Jewish law conceive of the relationship between these two normative systems?

Rabbinic traditions on the Noahide commandment of *dinin*, the focus of this article, provide a rich starting place for exploring this problem. According to rabbinic interpretation, the command of *dinin* obligates non-Jews to preserve social order by creating legal arrangements and establishing courts to enforce the Noahide Code. The elaborate procedural barriers to the imposition of capital punishment characteristic of the Sinaitic judicial system, such as the requirement of forewarning and the testimony of two conforming witnesses, do not

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The author wishes to express her appreciation to Rabbi J. David Bleich, Professor Arthur J. Jacobson, Professor David Shatz, Professor Marty Slaughter and Professor Richard Stone for their helpful comments at various stages in the preparation of this Article.

Unless otherwise noted, translations are by the author. Published English translations of sources are cited where available for the convenience of the reader, although original Hebrew sources were consulted in the preparation of this Article. Citations to the Tosefta refer to the 1973 Zuckermandl edition. The term "tannaitic" refers to the period of the Mishnah (circa 50-200 C.E.). *Baraitot* are tannaitic material not included in the Mishnah. The terms *Midrash* and *Aggadah* refer to rabbinic narratives tied to scriptural verse.

apply to the Noahide judicial system. The Noahide judicial system outlined in classical rabbinic texts follows, instead, conventional methods of adjudication geared to the enforcement of norms. There is no clear scriptural counterpart to this Noahide obligation to preserve social order in the Sinaitic Code. Yet Jewish law recognizes various jurisdictions empowered to impose punishment on Jews pursuant to methods of adjudication prescribed for Noahides. In this article, I concentrate on two questions raised by this schema which may shed light on the larger problem of the relationship of the two legal systems in rabbinic thought: (1) why the rabbis defined the Noahide judicial model differently from the Sinaitic model; and (2) whether the Noahide commandment of *dinin* has functioned as a residual source of authority in Jewish law to exercise penal authority over Jews without resort to the formal requirements of Sinaitic procedure.

Two papers presented at this conference address these questions in part. Professor Rakover's presentation, *Jewish Law and the Noahide Obligation to Preserve Social Order*,[1] investigates why the rabbis defined the judicial systems of the two Codes differently. He argues that the rabbis defined the Noahide judicial system in accordance with their conception of "natural human law" and objectively rational rules of procedure, whereas the judicial system of the rabbinic courts was determined by Scripture and rabbinic exegesis. Rabbi Bleich's contribution, *Jewish Law and the State's Authority to Punish Crime*,[2] addresses an aspect of the second question raised by rabbinic interpretations of the Noahide command of *dinin*: whether the civil state, which uses the Noahide judicial model, has authority (in Jewish law) to punish Jews for crimes, despite the bypassing of the formal Sinaitic rules of procedure.

Both these studies shed light on the political philosophy of classical and medieval Jewish jurists and, in particular, their attitude to pluralism in law, a subject that has received scant academic attention. Professor Rakover implies that the rabbis conceived of plural legal orders based on different legitimating principles. The rabbis embraced natural law theories of justice as the appropriate legal basis for non-Jewish forms of governance, while rejecting natural law as a sufficient basis for Jewish government. Rabbi Bleich's paper also addresses the political tradition in Jewish law by showing how several medieval jurists deduced in the Sinaitic Code a counterpart to the Noahide obligation of *dinin*, requiring the Jewish community to preserve basic aspects of social order. Both studies implicitly conceive of

[1] 12 Cardozo L. Rev. 1073 (1991).
[2] 12 Cardozo L. Rev. 829 (1991).

the relationship between the two legal orders as largely historic, with the Sinaitic Code displacing and superseding the Noahide Code for Jews. Thus, these concurrent legal systems occupy essentially separate domains.

I want to consider the possibility of a more complex relationship between these two systems of law by focusing first on the historic tension in Jewish thought between the aspirational goals of the Jewish criminal law system and the need for more conventional forms of government. The Noahide system of adjudication symbolizes in Jewish thought legitimate political government, geared to the enforcement of social norms through legal process. The Sinaitic criminal adjudicatory system rests on a different axis. It is a system of exceptional leniency to the accused that reflects certain assumptions about both the privileges granted by God with the election of the Jews at Sinai and the nature of divine justice that Jews are commanded to emulate. The two judicial systems are logical outgrowths of the different goals of the two legal Codes. The Noahide Code addresses the obligations of members of social communities and sets forth how such communities may achieve a moral political life; the Sinaitic Code addresses the obligations of a covenantal community. Indeed, rabbinic assumptions about both the privileges and demands of membership in a covenantal community as opposed to a conventional political community seem to determine, to a large extent, the distinctly different sets of obligations embodied in the Noahide and Sinaitic Codes. Thus, the two Codes express two different conceptions of law. In the Noahide Code, law primarily is an instrument of social control to prevent harm and promote social peace. In the Sinaitic Code, law embodies the positive ideals of a particular people and connects them to God. Therefore, obedience to the law flows from commitment, rather than coercion.

The Sinaitic Code seemingly addresses the conventional as well as the more spiritual elements of Jewish government. The idea of human monarchy appears in *Deuteronomy* 17. In the *Book of Samuel*, God directs the reluctant prophet to accept Israel's desire for conventional government. This is implicit in 1 *Samuel* 20: "We also shall be like all the nations: our kings shall judge us, and go out before us and fight our wars." The aspirational model of adjudication outlined in the Sinaitic Code for the rabbinic courts was counterbalanced, in medieval Jewish thought, by the judicial powers of the Jewish king to preserve social order through more conventional methods of criminal enforcement. The "king's justice" is one basis cited for the authority of various Jewish governmental institutions as well as the civil state to enforce penal laws against Jews without resort to

Sinaitic procedure. Indeed, the Jewish criminal law system is described by Professor Enker, in this volume, as bipartite, consisting of one jurisdiction bound by formal Torah law and a second jurisdiction (that of the king, the rabbinic courts exercising emergency powers, and their legitimate successors) empowered to dispense justice pursuant to the methods of adjudication outlined for Noahide courts.

One of the more interesting theses advanced in recent rabbinic scholarship is that the Noahide Code itself is the source of the judicial authority of a Jewish king to implement a form of government paralleling that described for Noahides.[3] This thesis, at odds with the traditional view that the Noahide Code was superseded for Jews by the revelation at Sinai, implies that the Noahide obligations served in rabbinic thought as a residual source of law for Jews. This thesis, I argue, is consistent with a strand of rabbinic tradition that views the Sinaitic revelation as supplementing the Noahide Code, rather than displacing it. According to these traditions, the Noahide commandment of *dinin* is a part of the revealed law given also to Israel, intended to complement the Sinaitic Code's ideal form of judicial justice, from which the authority to revoke the procedural rules of the Sinaitic Code is derived. Studies of how the Noahide and Sinaitic Codes interact in Jewish legal thought thus may illuminate one way in which rabbinic Judaism attempted to achieve a synthesis between two forms of government—the conventional and the ideal.

Because this conference embraced a wide range of participants, not all of whom are familiar with Jewish law, Part I of this essay introduces the concept of Noahide law. Part II briefly summarizes the major interpretations of the Noahide command of *dinin*. Parts III and IV address the differences between the two judicial systems. Part III assesses Professor Rakover's thesis that the Noahide judicial system differs from the Sinaitic model because the former is defined by the rabbis in terms of "natural human law" whereas the latter is based on scriptural interpretation. Part IV pursues an alternative approach and suggests that the Noahide judicial model is the product of the particular conceptual framework around which the Noahide Code is organized. In this section, I contrast the goals of the Noahide Code with those of the Sinaitic Code and discuss how the two judicial models are intricately tied to these different visions of law. Part V of this article addresses the relationship between the Noahide obligation of *dinin* and the various Jewish legal doctrines that authorize punishment of Jews in accordance with Noahide rather than Sinaitic meth-

[3] M.S. haCohen ("Or Sameah"), commenting on Maimonides, The Code of Maimonides, Laws of Kings 3:10. See discussion infra notes 191-92 and accompanying text.

ods of adjudication. More specifically, it traces how the Noahide Code has served as a residual source of law for Jews, a bridge between the ideals of formal Torah law and the realistic constraints of maintaining a legal community over time.

I. THE DOCTRINE OF NOAHIDE LAW

The main themes of classical and medieval Jewish political and legal philosophy are domestic, not international or comparative. Rabbinic treatises about the relative merits of different forms of government or theories of justice—the focus of Western political and legal theory—are virtually nonexistent.[4] The medieval Jewish political tradition focuses primarily on the institutional roles of the king, the Sanhedrin and the Messiah, prompting one observer to comment that "what little of political theory may be found in the Jewish tradition is linked to the mythical past or to the eschatological future."[5] Jewish legal literature, on the other hand, is practical and argumentative rather than speculative or utopian. Legal theory is devoted to explaining the proper governance of Jewish society, as set forth in the written and oral law.[6] The exclusive covenantal relationship formed between God and Israel at Sinai when the Jews were elected by God to receive the Torah implies that the ideal constitution embodied in the written and oral law is the particular inheritance of Israel. Therefore, only Jews are bound by the six hundred and thirteen commandments contained in it.

The exclusiveness of the covenantal relationship between God

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[4] See S. Baron, Some Medieval Jewish Attitudes to the Medieval State in Ancient and Medieval Jewish History 77-95 (1973); Funkenstein, Maimonides: Political Theory and Realistic Messianism, 11 Miscellania Mediaevalia 81, 82 (1977).

The Book of Principles of the fifteenth-century Spanish theologian, Joseph Albo, is unique in its investigation of the foundations of natural, conventional and divine legal systems. J. Albo, Sefer haIkkarim (Book of Principles) (I. Husik trans. 1930). Even Albo's discussion of natural and conventional law is merely a brief prelude to his consideration of the roots of divine law. Maimonides's conception of the foundations of civil government is even more elusive. We no longer need to attend to the political doctrines of the philosophers, he asserts, because "men's conduct is now governed by divine regulation." Maimonides, Treatise on Logic 14, in 8 Proceedings of the American Academy for Jewish Research 65 (I. Efros trans. 1938-39). For a fascinating attempt to reconstruct Maimonides's views of civil government, see Strauss, Maimonides' Statement on Political Science, 22 Proceedings of the American Academy for Jewish Research, in Essays in Medieval Jewish and Islamic Philosophy 115 (1977).

[5] Funkenstein, supra note 4, at 82.

[6] "[T]hus the Talmud takes its place alongside Plato's *Republic* as a search for the ideal constitution, with the difference that the rabbinic blueprint can never be but an academic exercise—'thou shalt observe *and do* these statutes' (*Deut.* 16:12)." Loewe, Potentialities and Limitations of Universalism in the *Halakhah*, in Studies in Rationalism, Judaism and Universalism 115, 116 (R. Loewe ed. 1966).

and Israel is counterbalanced in Jewish thought, however, with a concept of universalism that invites the nations of the world to learn from the teachings of the Torah.[7] The doctrine of the Seven Commandments of Noah is the legal formulation of this concept. The Noahide doctrine is thus unusual in Jewish legal literature. In elaborating the Noahide commandments, Jewish jurists have a rare occasion to reach beyond the Jewish social structure. Rabbinic development of the Noahide system of law necessarily entails speculation about the different forms of justice suitable for different communities. In many ways, rabbinic opinions elucidating the Noahide commandments can be read as a political treatise, a blueprint for a community of which its drafters are not members.

The doctrine of Noahide laws has been a source of fascination not only for students of Jewish law; indeed, the doctrine occupies a central place both in the history of international legal scholarship and in Jewish-Christian interchange.[8] Several historians of religion contend that the Noahide laws formed a basis for Paul's teaching to the Church.[9] For Grotius[10] and Selden,[11] the Noahide laws were an early model for the Roman "law of nations." Hermann Cohen, the nineteenth-century neo-Kantian, claimed they were a Jewish version of the idea of reason.[12] Despite the significance of this doctrine in the eyes of legal historians and philosophers, there have been few analyses that have taken into account the large corpus of Jewish legal material devoted to the subject.[13] Accordingly, I first would like to compare

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[7] For an interesting account of the differences between the Jewish and Christian models of universalism see A. Segal, Rebecca's Children: Judaism and Christianity in the Roman World 163-81 (1986).

[8] See generally J. Katz, Exclusiveness and Tolerance (1961); H. Schoeps, The Jewish-Christian Argument (D. Green trans. 1963); Dienstag, Natural Law in Maimonidean Thought and Scholarship (On Mishneh Torah, Kings VIII, 11), 6 Jewish L. Ann. 64 (1987).

[9] See, e.g., Wyschograd, A Jewish Reading of St. Thomas Aquinas on the Old Law, in Understanding Scripture 125, 136-38 (C. Thoma & M. Wyschograd eds. 1987).

[10] H. Grotius, De Jure Belli ac Pacis (F. Kelsey trans. 1964). See generally Husik, The Law of Nature, Hugo Grotius, and the Bible, 2 Hebrew Union C. Ann. 381 (1925).

[11] J. Selden, De Jure Naturali et Gentium Juxta Disciplinam Ebraeorum (1640). For a discussion of Selden's theory of Noahide law and the origins of government, see generally Sommerville, John Selden, The Law of Nature, and the Origins of Government, 27 The Historical Journal 437 (1984).

[12] H. Cohen, Religion of Reason Out of the Sources of Judaism (S. Kaplan trans. 1972). For a discussion of Cohen's treatment of the Noahide laws, see Schwartzchild, Do Noachites Have to Believe in Revelation? (pts. 1 & 2), 52 Jewish Quarterly Rev. 297 (1962), 53 Jewish Quarterly Rev. 30 (1962); Novak, Universal Moral Law in the Theology of Hermann Cohen, 1 Modern Judaism 101 (1981).

[13] Two noteworthy exceptions in English are D. Novak, The Image of the Non-Jew in Judaism (1983) (presenting a critical analysis of the function of the Noahide laws in Jewish philosophy) and A. Lichtenstein, The Seven Laws of Noah (1981) (systematizing many of the legal responsa defining the seven commandments).

historical and post-Enlightenment philosophic treatments of the Noahide doctrine with the traditional rabbinic viewpoint.

A. *Historical Reconstruction of the Noahide Laws*

Historians investigating the origin and function of the Noahide laws have put forth two principal theses. Several hold that the Noahide laws were a juridical statement of the legal obligations of non-Jews living under the political authority of Israel.[14] Because the Noahide laws exempt non-Jews from many of the more formal requirements of Judaism, the doctrine often is compared to the other noted pluralistic legal arrangement of late antiquity, *ius gentium*,[15] which

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[14] See J. Faur, The Fundamental Principles of Jewish Jurisprudence, 12 N.Y.U. J. Int'l L. & Pol. 225, 226 (1979); L. Finkelstein, Some Examples of the Maccabean Halaka in Pharisaism in the Making 222, 226-27 (1972). The Talmud also sometimes places the Noahide laws within this framework. See Babylonian Talmud, Avodah Zarah 64b. The talmudic discussion of the Noahide laws in the Babylonian Talmud, Sanhedrin 56a-59a, is arguably ambiguous as to whether the Noahide laws are enforced in rabbinic courts or independent Noahide courts. See infra note 63; cf. Derrett, Behuqey haGoyim (Damascus Document IX, 1 Again) in 11 Revue de Qumran no.3 410-11 (1983) (arguing that the talmudic discussion presupposes a system of servient Noahide courts under the jurisdiction of Jews).

Academics have debated the historical authenticity of the Noahide commandments during the prebiblical and postbiblical periods. Several claim it was an actual ancient Near Eastern code of law like the Code of Hammurabi and the Hittite Code. See A. Lichtenstein, supra note 13. There is no specific reference to Noahide obligations, as such, in the Bible. The Book of Jubilees, 7:20, written in the second century B.C.E., the Hasmonean period, does refer to a warning by Noah that certain commandments must be observed by all humanity. The first precise legal definition of Noahide obligations appears in the tannaitic period in the anonymous *baraitot* found in the Tosefta, Avodah Zarah 8:4, and Babylonian Talmud, Sanhedrin 56a-60b.

Both Faur and Finkelstein contend that the Noahide laws originated in the Hasmonean period when Jews once again ruled their own land and had to formulate the legal obligations of the large number of aliens who lived within the borders of the Jewish sovereign state. Faur sees support for the thesis that the Noahide laws govern only non-Jews living in Israel in Maimonides's treatment of the Noahide laws in his Code, The Code of Maimonides, Laws of Forbidden Intercourse 14:7. The fact that the Noahide laws are given precise legal formulation only after the loss of Jewish sovereignty is not unusual. Jewish law frequently elaborates doctrines that will only be of use in the future when Israel will be politically reconstituted in the days of the Messiah. See generally Goodman, Maimonides' Philosophy of Law, 1 Jewish L. Ann. 72 (1978). For a refutation of Faur's thesis on other grounds, see Schneebalg, The Philosophy of Jewish Law—A Reply to Professor Faur, 13 N.Y.U. J. Int'l L. & Pol. 381, 384-87 (1980); see also D. Novak, supra note 13, at 11-35 (refuting Finkelstein's theory and arguing that the Noahide laws were not a functioning body of law administered by Jews for non-Jews but rather a "theological-juridical" theory dating to the early tannaitic period); Urbach, Self-Isolation or Self-Affirmation in Judaism in the First Three Centuries: Theory and Practice in 1 Jewish and Christian Self-Definition: The Shaping of Christianity in the Second and Third Centuries 269, 275-76 (E. Sanders ed. 1980) (arguing that tannaitic and amoraic discussion of the Noahide laws assumes non-Jewish autonomy).

The Jewish legal system treats the Noahide laws as biblical in origin. See infra note 26 and accompanying text.

[15] The Roman institution of *ius gentium* was a conventional legal doctrine of private inter-

exempted foreigners living under Roman authority from Roman civil law and the state religion.[16] Other historians have concluded that the Noahide doctrine was linked to the phenomenon in the Second Temple period of semiconverts, pagans who adopted various Jewish precepts including monotheism.[17] The Noahide obligations were formulated to identify which of these semiconverts on the fringes of Judaism had the status of "resident-aliens"[18] or "fearers of Heaven."[19]

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national law that regulated legal relations between non-Roman citizens (peregrines) under Roman rule and between Roman citizens and peregrines. B. Cohen, Jewish and Roman Law 26-27 (1966); R. Sohm, The Institutes: A Text-Book of the History and System of Roman Private Law 69 (J. Leslie trans. 2d ed. 1901). With the penetration into Roman intellectual life of Stoic philosophy, *ius gentium* also became associated with the *ius naturale*, those universal and unchanging moral laws observed by all nations. Cohen, supra, at 27. Cohen compares the Noahide laws to the latter connotation of *ius gentium*. This interpretation of the Noahide laws is discussed infra notes 33-50 and accompanying text.

For an interesting attempt to use the Noahide laws as the basis for a doctrine of *ius gentium* to regulate legal relations between non-Jews and Jews, see Frimer, Israel, The Noahide Laws and Maimonides: Jewish-Gentile Legal Relations in Maimonidean Thought, in Jewish Law Association Studies II 89, 99-101 (B. Jackson ed. 1986).

[16] Under Roman rule, for example, the civil legal systems of the Jewish communities were left intact. Jews had their own courts and civil legal authority was based on Jewish law. See generally 2 G. Alon, The Jews in their Land in the Talmudic Age (G. Levi trans. 1984). Similarly, in the middle ages under the corporate structure of feudal society, Jewish communities had judicial authority over their members and were allowed to adhere to their own jurisdiction which was based on talmudic law. See generally S. Assaf, Punishment After the Close of the Talmud (Heb.) (1922); J. Katz, supra note 8.

These pluralistic legal arrangements allowed for the full development of Jewish law even after the loss of autonomous nationhood. For an account of how the modern principle of religious toleration effectively destroyed the Jewish identity preserved in the autonomous Jewish Kehilla of medieval corporatist Europe, see N. Stolzenberg & D. Myers, Kehillah, Constitution and Culture (January, 1989) (Paper presented to Stanford Conference on Critical Legal Studies, Jewish law and Jewish history). The Jewish experience thus provides a powerful example for contemporary legal theorists interested in the revival of pluralistic legal arrangements at odds with the legal exclusivism of the modern state. See, e.g., Dane, The Maps of Sovereignty: A Meditation, 12 Cardozo L. Rev. 959 (1991); Griffiths, What is Legal Pluralism, 24 J. Legal Pluralism 1, 3 (1986).

[17] Groups of non-Jews who renounced idolatry and accepted the moral laws of Judaism are referred to in the Talmud. Different groups of these semiconverts adopted different parts of Jewish ritual. See S. Lieberman, Greek in Jewish Palestine 81-82 (1965); see also B. Bamberger, Proselytism in the Rabbinic Period 135-40 (1939).

[18] The term "resident-alien" is not simply a political designation for non-Jews who reside in a Jewish polity. In Jewish law, the term also refers to a particular status conferred upon non-Jews who live among Jews and keep a certain portion of Jewish law. See Palestinian Talmud, Yevamot 8.1; Babylonian Talmud, Avodah Zarah 64b-65a.

[19] The talmudic rabbis also referred to some non-Jews as "fearers of Heaven," who were compared to high priests and promised their share in the world to come. See S. Lieberman, supra note 17, at 77; see also B. Bamberger, supra note 17.

Lieberman contends that the Noahide laws were a criteria for determining which groups of semiconverts could be called "fearers of Heaven." This thesis accounts both for the practical need to define the Noahide obligations in the early classical period and also may account for the extensive talmudic debate over the number and identity of the Noahide laws. One *baraita* in the Babylonian Talmud alludes to thirty Noahide commandments, Hullin 92a-b,

Eventually, the Noahide obligations were associated with the talmudic dictum that all the "righteous men of the nations of the world have a share in the world to come."[20]

Grotius gave these universal obligations a legal emphasis consonant with the theory that the Noahide laws were a Jewish version of *ius gentium*. The Noahide laws, he argued, are the foundations for the theory of the civil state and international law. They are seven universal legal imperatives inherent in man's nature and discoverable through the exercise of reason.[21] Mendelssohn and Cohen, on the other hand, used Grotius's formulation to answer the ethical question how a just God could condition salvation for non-Jews on adhering to laws that were not directly revealed to them. For Mendelssohn, the Noahide doctrine taught that, in Judaism, the means to attain salvation were available to each man based not on his acceptance of a particular historical revelation but on his human moral capacity to reason.[22] Hermann Cohen also argued that "[t]he Noahide is not a believer but a citizen . . . [he is] a moral human being."[23] Cohen, struck by the fact that the command of *dinin* is listed in some of the talmudic sources as the first of the Noahide laws,[24] thought that this command was emblematic of the civil nature of the doctrine. The Noahide obligation of *dinin*, he wrote, "is the forerunner of natural law for the state."[25]

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although the thirty laws are nowhere identified in rabbinic literature. See *Rashi*, commenting on Babylonian Talmud, Hullin 92a-b. Minority or alternative opinions of tannaitic rabbis quoted in the Talmud also dispute which laws were within the basic seven Noahide laws, adding other prohibitions such as witchcraft, crossbreeding and castration. See Babylonian Talmud, Sanhedrin 56a-57a. A biblical commentary by Samuel ben Hophni Gaon, discovered in the Cairo Geniza, presents a list of thirty commands which include all the minority opinions as well as other prohibitions. See Lichtenstein, Noahide Law From The Genizah: The Thirty Laws of Samuel Ben Hophni Gaon, 28 Hebrew Studies 113 (1987).

According to Lieberman, the clash over the number and character of the Noahide laws "mirrors the facts of actual life," since the semiconverts differed in their observance of Jewish precepts. S. Lieberman, supra note 17, at 81. But see D. Novak, supra note 13, at 20-35. Novak argues that the doctrine of seven Noahide laws emerged after the "God fearers" or semiconverts virtually disappeared. He suggests that the Noahide laws were intended to create a strict demarcation between Jews and all non-Jews after the Christian schism.

20 Tosefta, Sanhedrin 13:2. See also Babylonian Talmud, Sanhedrin 105a.

21 See supra note 11.

22 M. Mendelssohn, Jerusalem and Other Jewish Writings 66 (A. Jospe trans. 1969).

23 D. Novak, supra note 13, at 105 (citing H. Cohen, Die Naechstenliebe im Talmud, JS 1:159-60).

24 Babylonian Talmud, Sanhedrin 56a. The order is different in Genesis Rabbah 16:6 and Song of Songs Rabbah 1:5.

25 H. Cohen, supra note 12, at 122-23.

B. *The Traditional Rabbinic Viewpoint*

Most jurists participating in the development of the Jewish legal system, and whose opinions we study here, view the Noahide obligations from a somewhat different perspective. The Noahide laws are biblical in origin. They were divine commandments to Adam and Noah.[26] These divinely-revealed commandments governed all humanity until the Sinai revelation. At Sinai, Jews were given their own legal code; the rest of humanity was bound by the Noahide laws. Although the earliest presentation of the Noahide laws in Jewish legal literature is consistent with the notion that they are a set of minimal universal legal imperatives, Jewish jurists, as early as the talmudic period, viewed the Noahide Code as a comprehensive body of legislation subsumed under the rubric of seven broad commandments.[27] Take, for example, the Noahide commandment against theft. According to Maimonides, the law enjoining theft also includes prohibitions against withholding the pay of a laborer,[28] kidnapping, and other matters.[29] The Noahide laws do not address only civil matters. Belief in God is an element of the Noahide Code, either implicitly or as an aspect of the law of blasphemy.[30] The Talmud, in the course of discussing the Jewish legal obligation of martyrdom, for example, offhandedly engages in a debate whether Noahides, too, must sanctify God's name by accepting death rather than violating the law.[31] Many of these specific regulations are discussed in the Talmud, codified by Maimonides and debated by other jurists. Indeed, one author estimates that the Noahide Code consists of nearly a quarter of the commandments contained in the written and oral law that are not dependent on occupation of the land of Israel.[32] Thus, for those within the traditional framework, the Noahide Code is a meaningful counterpart to the six hundred and thirteen commandments given by God to Israel.

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[26] The Babylonian Talmud, Sanhedrin 56a-b, finds scriptural support for the seven commandments in Genesis 2:16. See also Maimonides, The Code of Maimonides, Laws of Kings 9:1 (explaining that the seven commandments are part of the tradition received from Moses at Sinai).

[27] Cf. A. haLevi (Hinnukh), Sefer haHinnukh, Commandment 424, at 543 (C. Chavel ed. 1952). The Hinnukh writes that the seven laws are headings or categories for groups of subsidiary laws.

[28] Maimonides, The Code of Maimonides, Laws of Kings 9:9.

[29] Id.

[30] 2 R. Margoliot, Margoliot Hayam 18 (1958); Nissim ben Yaacov (Nissim Gaon), Introduction to Babylonian Talmud, Berakhot (Vilna ed. 1900); A. haLevi, supra note 27, Commandment 430, at 554-55.

[31] Babylonian Talmud, Sanhedrin 74b-75a.

[32] A. Lichtenstein, supra note 13, at 90-91.

The question how non-Jews not privileged to receive direct divine revelation gain knowledge of these laws given them by God is addressed within the tradition, although the resolution of this question still is the subject of intense academic debate.[33] Maimonides lists rational inclination in addition to revelation as a source of the law.[34] Earlier the Talmud had described five of the prohibitions identified with the Noahide Code as laws that "had [they] not been written [in Scripture], it would have been proper to have written [them]."[35] This statement as well as a few others alluding to possible sources of knowledge of the law independent of revelation[36] have given rise to a large body of literature devoted to the question whether the philosophy of natural law is consistent with rabbinic thought.[37] It is unlikely, however, that rabbinic descriptions of the Noahide laws as "rational" are intended to refer to the concept of natural law in either its classical[38] or later guises.[39] Although the rabbis of the Talmud and

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33 Bleich, Judaism and Natural Law, 7 Jewish L. Ann. 5 (1987); Dienstag, supra note 8; Fox, Maimonides and Aquinas on Natural Law, 3 Dine Israel 5 (1972); Lamm & Kirschenbaum, Freedom and Constraint in Jewish Judicial Process, 1 Cardozo L. Rev. 99 (1979); Leamann, Maimonides and Natural Law, 6 Jewish L. Ann. 78 (1986); Levine, The Role of Reason in the Ethics of Maimonides: Or Why Maimonides Could Have Had a Law Doctrine of Natural Law Even If He Did Not, 14 J. Religious Ethics 279 (1986); Schwartzchild, supra note 12.

34 Maimonides, The Code of Maimonides, Laws of Kings 9:1.

35 Babylonian Talmud, Yoma 67b. Contextual analysis of this statement indicates that the rabbis were commenting on the rationality of these laws, rather than obliquely suggesting that the laws could be logically deduced and obligatory on that ground alone. The continuation of the comment juxtaposes rational commandments such as murder and theft with other laws, such as dietary laws, which are not readily understandable. But both groups of commandments are treated as revealed commandments.

Interestingly, one of the two Noahide commandments not included in the dictum is the obligation of *dinin*.

36 The other talmudic dictum often quoted to illustrate that the rabbis knew the natural law is that of R. Yohanan about discovering virtues through the laws of physical nature. R. Yohanan stated that rabbinic virtues such as modesty, chastity and aversion to robbery, can be inferred from the conduct of animals. Babylonian Talmud, Eruvin 100b. Some scholars have interpreted this statement as a reference to a source of law independent of revelation "not only observable through physical nature but inherent within it." Lichtenstein, Does Jewish Tradition Recognize Ethic Independence of Halakha?, in Modern Jewish Ethics 62 (M. Fox ed. 1975). See B. Cohen, supra note 15, at 27-28. For the contrary view, see Bleich, supra note 33, at 23-25. The dictum is an exegetical expansion of a verse in Job (35:11) referring to God's "teaching us through the beasts of the earth." In connection with this verse, R. Hiyya declared that God endowed certain creatures with qualities in order that man may learn from them. R. Yohanan seems to limit R. Hiyya's remarks by stating that one might learn from attributes instilled by God in animals only had the Torah not been given. See E. Urbach, The Sages: Their Concepts and Beliefs 324 (I. Abrahams trans. 1975).

37 See supra note 33; Volumes 6 and 7 of the Jewish L. Ann. (1986 & 1987); 6 Vera Lex, No. 2 (1986); see also Faur, The Origin of the Classification of Rational and Divine Commandments in Mediaeval Jewish Philosophy, 9 Augustinianum 299 (1969).

38 Natural law, in the classical sense, is a theory about the place of man in God's providential order of nature. Its roots are in Stoic philosophy and, in particular, the Stoic notion of

medieval jurists were probably familiar with the philosophic premises of natural law doctrine,[40] there is little evidence that the concept of *lex naturalis* penetrated Jewish thought in any significant way.[41] Julius Stone argues persuasively that the chief mark of natural law theory is its "revolutionary" capacity to override positive legislation in the name of "right reason."[42] This aspect of natural law jurisprudence is entirely foreign to the Jewish legal system. The natural law question in Jewish law is whether reason is a source of obligation independent of the will of God as revealed in Scripture. In the case of the Noahide laws, however, the rabbis seem to be commenting on the intelligibility of these revealed laws and their suitability for all human nature. The rabbis do not suggest that the Noahide laws are binding commandments solely because they are deducible through reason.

Maimonides's treatment of the Noahide laws in his famous "literary puzzle"[43] comparing one who keeps the Noahide laws because they are rational to one who keeps them because they were revealed to Moses at Sinai captures the distinctly Jewish twist to this concept of

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Logos, or the divine reason, which pervades all creation. See generally Weinreb, The Natural Law Tradition: Comments on Finnes, 36 J. Legal Ed. 501 (1986). Hence, "living in accordance with reason" means living in accordance with the permanent natural order created by God. Id. at 503.

39 Thomistic natural law theories had little impact on medieval Jewish philosophy. Jewish philosophers were far more familiar with the natural law doctrines of Islam. Lamm & Kirschenbaum, supra note 33, at 107.

40 See generally B. Cohen, supra note 15; S. Lieberman, supra note 17. For an account of discussions between rabbis and Romans on cultural and religious questions of the time, see Herr, The Historical Significance of the Dialogues Between Jewish Sages and Roman Dignitaries, in 22 Scripta Hierosolymitana 123 (1971); see also 2 G. Alon, supra note 16, at 537. For an account of Islamic doctrines of natural law and their possible parallels in medieval Jewish philosophy, see Faur, supra note 37; Lamm & Kirschenbaum, supra note 33.

41 In a summary of a two-volume symposium on this question in the Jewish Law Annual, supra note 37, editor Bernard Jackson concluded that examples of natural law thinking in Jewish law "are relatively specific and limited." Jackson, Natural Law Questions and the Jewish Tradition, 6 Vera Lex no. 2, 1 (1986). There is virtually no indication of a source of morality other than the divine will, although there are a few examples of the use of reason as a source of law. See Bleich, supra note 33.

The Stoic idea of Logos does play a prominent part in Philo of Alexandria's treatment of Scripture. But Philo's work, written in Greek, had little impact on rabbinic thinking. There are scholars who take the position that natural law thinking was a characteristic of early rabbinic Judaism. Samuel Atlas, for example, has argued that the Talmud contains an inner layer of natural law that was later suppressed. S. Atlas, Pathways in Hebrew Law (Heb.) (1978). If so, the reasons for suppressing natural law speculation are not hard to find. The rise of sectarianism, particularly the Jewish-Christian schism, made the question of recognized forms of revelation a pressing topic. See Jackson, Secular Jurisprudence and the Philosophy of Jewish Law: A Commentary on Some Recent Literature, 6 Jewish L. Ann. 3 (1986).

42 J. Stone, Human Law and Human Justice 291-95 (1968).

43 The term is Julius Stone's in Stone, Leeways of Choice, Natural Law and Justice in Jewish Legal Ordering, 7 Jewish L. Ann. 210, 232 (1988).

universalism.[44] In one variant of Maimonides's statement (the *editio princeps* and the one that led Spinoza to his attack on the particularism of Judaism[45]), the former is neither a saint entitled to salvation nor even a "wise man."[46] In the other variant, one who accepts the Noahide laws because they are rational is a wise man. In both variants, however, only the Noahide who acknowledges Mosaic authority merits salvation. There have been a few attempts from within the traditional discourse to read Maimonides otherwise. R. Abraham Isaac Kook argued, for example, that the "wise man" represents for Maimonides a level of spiritual accomplishment superior to the attainment of a place in the future world.[47] Although R. Kook's interpretation is sensitive to the perceived problem of denying salvation to non-Jews who never heard of Mosaic legislation, it is contrary both to the plain meaning of Maimonides's statement[48] and to Maimonides's general endeavor to resuscitate the divine imperatival aspect of Mosaic legislation from what Maimonides termed the "disease of the Kalam."[49] Thus, most traditionalists would agree that Judaism's uni-

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[44] Discussing the tannaitic dictum, "all the religious men of the nations of the world have a share in the world to come," Tosefta, Sanhedrin 13:2, Maimonides wrote:

> Anyone [i.e., any non-Jew] who accepts the seven commandments and observes them scrupulously is a "righteous gentile," and will have a portion in the world to come, provided that he accepts them and performs them because the Holy One, blessed be He, commanded them in the law and made known through Moses our teacher that the observance thereof had been enjoined upon the descendants of Noah even before the law was given. But if his observance thereof is based upon a reasoned conclusion, he is not deemed a resident alien, or one of the righteous of the Gentiles, but one of their wise men.

Maimonides, The Code of Maimonides, Laws of Kings 8:11.

[45] The Maimonidean passage became the focus of Jewish-Christian interchange and Christian philosophic discourse on the validity of Judaism. See L. Strauss, Spinoza's Critique of Religion 147-92 (1965) (discussing Spinoza's critique of Judaism, based on this passage); A. Altmann, Moses Mendelssohn 204-22 (1973) (discussing Moses Mendelssohn's defense of Judaism in his famous polemic with the Christian theologian Lavater).

[46] The difference between "not one of their sages" (*velo*), and "but one of their sages" (*ela*) is the transcription of a single letter. Professor Dienstag offers convincing evidence, after an exhaustive look at the *variae lectiones*, that the proper reading is "*ela*" (but one of their sages). Dienstag, supra note 8, at 75-77. Scholars who accept the other reading ("not one of their sages") tend to ascribe to Maimonides the view that all human morality is neither true nor false; it is the product of social convention. See Fox, supra note 33; Bleich, supra note 33.

[47] A. Kook, Iggerot Reiyah 99-100 (1943).

[48] See Lamm & Kirschenbaum, supra note 33, at 117 n.74 (calling R. Kook's interpretation "questionable").

[49] Maimonides, Eight Chapters IV 77 (Gorfinkle ed. 1912).

Twersky argues that the extension of Mosaic authority to non-Jews was a logical "corollary" of the uniqueness of Mosaic prophecy for Maimonides. Maimonides, according to Twersky, viewed Moses as the only prophet capable of transmitting binding legislation; other prophets, like Adam and Noah, "could only exhort." I. Twersky, Introduction to the Code of Maimonides 455 n.239 (1980). Rabbi Bleich offers another explanation for Maimonides's invocation of Moses as the source of Noahide law. Although Maimonides does list divine revela-

versal doctrine of salvation is firmly tied to the exoteric nature of the Sinai revelation, a public revelation in the desert delivered, according to rabbinic narrative, in not one language but four or seventy,[50] and thus discoverable by all who inquire about God's historical dealings with man.

This large corpus of Jewish legal material defining the obligations of non-Jews who, by and large, are unaware of the existence of the doctrine and who are, in any event, not accountable to Jewish legal authority is to contemporary eyes no doubt strange. This strangeness is particularly acute in the case of opinions interpreting the obligation of *dinin*, which is addressed primarily to non-Jewish governmental entities. There are, of course, some practical reasons for elaborating the Noahide laws. In the course of history, the Noahide doctrine has served to identify societies that are moral in Judaism's eyes and with which Jews can enter into commercial, social and legal interchange. Rabbinic focus on the Noahide laws also is an occasion to compare the Jewish legal system to non-Jewish forms of government and to locate points of commonality and difference. Moreover, speculation about the Noahide Code is a way of understanding Judaism's pre-Sinai history and the lives of its ancestors recounted in the Bible. But the force of the doctrine stems as much from its aspirational goals as from pragmatic considerations or the need to understand either the

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tion to Adam and Noah as a source of Noahide law, The Code of Maimonides, Laws of Kings 9:1, he appears to have held that instruction in the Noahide commandments lapsed among non-Jews, breaking the chain of transmission. Therefore, a new revelation of the Noahide laws was necessary. See Bleich, supra note 33, at 35 (citing R. Malkiel Zvi Tennenbaum, Torah 'She be'al Peh, XV 164.1).

[50] For an account of the popular rabbinic narratives describing how the Torah was revealed at Sinai to all nations, but refused by all except Israel, see infra note 161 and accompanying text. These *Midrashim* probably have their genesis in attempts to explain the giving of the Torah only to Israel. They also underscore, however, the exoteric nature of the revelation. For the view that the law was revealed in four languages, see Sifre Deuteronomy sec. 343 (Friedmann ed. 1864). The four languages are the languages of Israel and its three immediate neighbors. These three nations often figure in the legend about the refusal of other nations to accept the Torah. Rabbinic narrative also assumes, based on Genesis 10, that there are seventy nations in the world. The account of the giving of the revelation in seventy languages is in the Babylonian Talmud, Sabbath 88b. A complementary version recounts that the law was inscribed by Joshua on the stones of the altar in Mount Ebal and was copied by scribes sent by the nations of the world into seventy languages. Tosefta, Sotah 8:6. The Talmud records several rabbinic opinions that non-Jews were not punishable for violations of the Noahide Code until after the law was inscribed on stones and thus published. See S. Lieberman, Hellenism in Jewish Palestine 200-02 (2d ed. 1962). These opinions, requiring publication of Noahide law, also run counter to the theory that the Noahide laws were a rabbinic doctrine of natural law.

For a detailed analysis whether Jews are obligated to impart knowledge of the Noahide laws to non-Jews, see D. Bleich, Teaching Torah to non-Jews in 2 Contemporary Halakhic Problems 311-40 (1983).

past or the external world. The elaboration of the Noahide laws is a logical extension of the Jewish legal system itself. The obligatory force of both the Sinaitic and Noahide legal systems derives from the fact that both are perceived as articulations of the revealed will of God. Finally, as discussed in greater detail in the last section of this essay, the Noahide commandments occupy a central place in the development of the Jewish legal structure as well. For, according to one thesis I will draw on, the Noahide commandments, in particular the command of *dinin* which has no clear scriptural counterpart in the Sinaitic Code, serve as a residual source of law for Jews.

II. THE OBLIGATION OF *DININ*

The precise contours of the Noahide obligation of *dinin* is a subject of substantial dispute among Jewish jurists. In light of this debate, it is useful to review the major opinions in historical progression. The earliest sources that discuss the obligation of *dinin* are the anonymous *baraitot* preserved in the Tosefta and Talmud.[51] These *baraitot* characterize *dinin* as an obligation to establish courts. The *Book of Aggadah deBei Rav*, a tannaitic source quoted in the Babylonian Talmud,[52] sets forth a schematic description of the adjudicatory system of Noahides—a system that differs markedly from Sinaitic law. A Noahide who violates one of the commandments may be sentenced to death in a court composed of only one judge, upon the testimony of only one witness and without warning that his conduct is illegal. By contrast, a rabbinic court may impose the death penalty on Jews only in a court composed of twenty-three judges, only if there is testimony of two qualified eyewitnesses and only if the defendant first is warned that his conduct is illegal. Although the Babylonian Talmud does not contain any further substantive elaborations of the command of *dinin*, the Palestinian Talmud apparently discussed additional aspects of this Noahide obligation. One *Amora* held, according to a version of the Palestinian Talmud,[53] that Noahides can be convicted on the basis of confessional evidence, evidence that is not admissible in a rabbinic

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[51] Tosefta, Avodah Zarah 8:4; Babylonian Talmud, Sanhedrin 57b.

[52] Babylonian Talmud, Sanhedrin 57b. The term *Aggadah* ordinarily refers to nonlegal rabbinic narratives. Here, a law is cited from the Book of Aggadah. One historian contends that the Book of Aggadah deBei Rav was primarily a compilation of laws concerning non-Jews. To distinguish these laws from those pertaining to Jews, the compilation was called a Book of Aggadah. See editor's comments to Babylonian Talmud, Sanhedrin 57b note e(6) (Soncino ed.) (citing I. Weiss, Dor Dor veDorshav).

[53] Palestinian Talmud, Kiddushin 1:1 (version cited in R. David Frankel, Korban haEdah); see also Genesis Rabbah 34:14 (Albeck ed. 1931). For a comprehensive discussion of the use of confessional evidence in Noahide courts, see Kirschenbaum, The Principle Against Self-Incrimination in Noahide Law (Heb.), 2 Dine Israel 71 (1971).

court. In addition, Nahmanides quotes a statement in the Palestinian Talmud, no longer extant in our versions, that a Noahide judge who perverts justice or accepts a bribe is subject to the death penalty.[54] In sum, the talmudic discussion is concerned primarily with the judicial responsibilities of Noahides. This focus is supported by a recent analysis of the term "*dinin*" in talmudic Hebrew, which concludes that it connotes matters of judicial procedure.[55]

Medieval jurists debated whether the command of *dinin* had further implications. Maimonides stayed close to the talmudic focus on judicial activity and seems clearly to have read the term *dinin* as referring to judicial procedure. He held that *dinin* is a command to non-Jews to set up a working court system to enforce the six substantive Noahide obligations.[56] Nahmanides suggested, however, that the Noahide obligation of *dinin* also refers to the adoption of a code of law. This view may be due, in part, to the more popular reading of the term *dinin* in the medieval period to refer to a group of substantive laws or customs.[57] Nahmanides stated that Noahides were commanded with a variety of laws covering interpersonal and commercial relations "similar in scope to the laws with which Israel was charged . . . ."[58] Later authorities argue about the implications of Nahmanides's opinion. Some hold that Noahides were charged with the same civil laws with which Israel was charged.[59] According to this view, Sinaitic civil legislation is incorporated into the Noahide Code through the obligation of *dinin*. Others hold that Noahides are com-

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[54] Nahmanides, 1 Commentary on the Torah 418 (Chavel ed. 1971) (commenting on Genesis 34:13).

[55] See E. Urbach, The Halakha: Its Sources and Development, 88-92 (R. Posner trans. 1986). According to Urbach, the biblical Hebrew term *din* implies judicial procedure and not substantive laws, doctrine or customs. Mishnaic and talmudic Hebrew, according to Urbach, preserves this connotation. Id. at 89. The plural formulation of the word *din* (*dinim*) occurs for the first time in rabbinic Hebrew. Urbach contends that the plural formulation "*dinim*," found in the Mishnah and Talmud, has precisely the same connotation as the singular *din*, and also refers to judicial procedures, judicial discussion or judicial enforcement. According to Urbach, laws are not called *dinim* even if they are in the field of damages or torts. Id. at 91. Thus, Urbach translates the Noahide obligation of *dinin* as "the act of performing justice." Id. at 89; see also infra note 159.

Genesis Rabbah 16:6 (Theodor-Albeck ed. 1931) refers to the Noahide commandment as *dayyanim* (judges). See also Song of Songs Rabbah 1:5 (*dayyanim*); Pesikta of R. Kahanah, Piska 12 (Buber ed. 1906) (*dayyanim*).

[56] Maimonides, The Code of Maimonides, Laws of Kings 9:14.

[57] E. Urbach, supra note 55, at 89-90, contends that, with the passage of time, the verdict or judicial rule became a precedent. The precedent, in turn, became a substantive norm, referred to in mishnaic Hebrew as *shurat-hadin*. This process may account for the medieval usage of the term *dinin* to refer to a group of laws or customs.

[58] Nahmanides, supra note 54.

[59] M. Isserles (*Rema*), Responsa Rema, Responsum no. 10; M. Sofer (Hatam Sofer), Responsa Hatam Sofer, Responsum no. 14.

manded to adopt a civil code of law but are free to develop the content of this code in light of the particular needs of their individual societies.[60] A similar dispute exists with respect to Maimonides's views. Some authorities suggest that Maimonides also held that the Noahide Code incorporates most of Mosaic civil legislation, under the rubric of the Noahide obligation of theft rather than the obligation of *dinin*.[61] Others contend that Maimonides held that Noahides are free to develop their own rules of civil law.[62]

The jurisprudential premises of these various opinions are not clear. The dispute ostensibly centers on the degree to which the Noahide Code should differ from Mosaic legislation.[63] The controversy is brought into focus by the *Rema*, who systematizes the diverse opinions into two schools of thought. He also traces the two schools to an exegetical dispute in the Talmud about the proper proof-text for the obligation of *dinin*. According to the *Rema*, the *Amora* R. Isaac held that the laws for Noahides subsumed under the command of *dinin* are

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60 Naftali Tzvi Yehudah Berlin (*Netziv*), Ha'amek She'elah, She'iltah 2:3; J. Anatoli, Malmad Hatalmidim (1866), Noali (12a) and Mishpatim (71b-72a), quoted also by R. Margoliot, Margoliot Hayam, Sanhedrin 56b, no. 9; N. Mez, Binyan Shlomo, commenting on Babylonian Talmud, Sanhedrin 56b.

61 For an analysis of why Nahmanides may have subsumed these laws under the command of *dinin* and Maimonides under the laws of theft, see A. Lichtenstein, supra note 13, at 36-38.

62 Margoliot Hayam, Sanhedrin 56b nos. 10-11; Einayim Lamishpat, commenting on Babylonian Talmud, Sanhedrin 56b, no. 5; Hilkhot Medinah 2-5 (vol. 1, secs. 2-3) and 231-32 (vol. 3, sec. 2); Mishmeret Hayyim (Regensberg) 152 (chap. 39); Responsum Yehaveh Da'at 313 (note) (vol. 4, sec. 65).

In addition, a group of scholars hold that the position of *Rema* and Hatam Sofer, supra note 59, only applies in the absence of expressed legislation by non-Jewish legislatures. See Frimer, supra note 15, at 100 nn.60-61.

63 This dispute would be less puzzling if the Noahide doctrine was confined to non-Jews living under the authority of a Jewish state. The dispute would then center on whether non-Jews living under Jewish authority must obey the dominant Jewish civil law or are free to develop and apply their own civil laws. Thus, Finkelstein, supra note 14, who identifies the Noahide commandments with the laws non-Jews living in the Jewish Maccabean state were required to observe, argues that the proper interpretation of the term "*dinin*" in the earliest rabbinic texts is the corpus of Jewish civil law. Id. at 21 n.4. The talmudic discussion of the scope of the Noahide laws is arguably ambiguous. It is possible to interpret the discussion in the Babylonian Talmud, Sanhedrin 56a-60a, as concerned with actual enforcement of these laws in rabbinic courts. But the general thrust of the talmudic discussions of the Noahide laws seems to assume both non-Jewish autonomy and the universal binding nature of the Noahide laws. See, e.g., Mishnah, Nedarim 3:11 (equating Noahides with the nations of the world); see also Urbach, supra note 14, at 276. Even Finkelstein concedes that the original scope of the Noahide laws was "forgotten" by the time of the Tosefta and Talmud and hence the Tosefta and Talmud define the term *dinin* as a requirement to establish courts rather than to obey Jewish civil law. Finkelstein, supra note 14, at 21 n.4.

Of course, when the medieval debate over the scope of the command of *dinin* crystallized, in the opinions of Nahmanides, Maimonides and the *Rema*, the universal binding character of the Noahide laws clearly was assumed.

identical with Mosaic law.[64] For this reason, R. Isaac derived the obligation "from a verse said at Sinai."[65] Therefore, Noahide law is the equivalent of Sinaitic law, except where Sinaitic law itself is thought to stipulate differential treatment for Jews and Noahides (as in the case of judicial procedure).

The second school of thought construes the obligation of *dinin* as a call to non-Jewish communities to adopt and enforce their own systems of jurisprudence. The *Rema* traces this school of thought to the exegetical comments of the *Amora* R. Yohanan who derived the obligation from a verse in *Genesis* 18:19 referring to commandments given by God to Abraham prior to the revelation of the Sinaitic Code. According to the *Rema*, for R. Yohanan, "Noahides are required, pursuant to the obligation of *dinin*, only to obey the conventional rules of government and to adjudicate between persons equitably."[66] The clearest exposition of this school of thought is in a homiletical work of R. Anatoli, a thirteenth-century commentator. R. Anatoli suggests that the commandment of *dinin* obligates non-Jews to create and observe legal arrangements. The judges and legislators of each country must draw up rules of conduct appropriate for that particular country "as is currently done in each nation either by non-Jewish religious leaders, kings, political leaders or judges."[67] Accordingly, Noahides are obligated, pursuant to the command of *dinin*, to abide by the "agreed-upon" laws of their respective governments.[68]

The result of this dispute is two very different assessments of the legitimacy of existing non-Jewish governmental activity. According to the first school of thought, Mosaic legislation defines all juridical relationships. Non-Jewish judges deciding a civil dispute between non-Jewish litigants must apply Sinaitic civil law to fulfill the command of *dinin*. Thus, there is only one form of political governance, one constitution valid for all societies given by God both to Jews and non-Jews. Non-Jews can achieve a well-ordered political life only by adhering to legal principles set forth in the written and oral law. Noahide judicial discretion is therefore limited. It consists of applying previously-defined rules contained in Mosaic legislation to differentiated situations. This school of thought underscores the potential universalism of Jewish law, a position that may have its antecedents in the work of the ninth-century philosopher, Saadya Gaon. It implies

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64 *Rema*, supra note 59.

65 Exodus 22:8.

66 *Rema*, supra note 59.

67 J. Anatoli, supra note 60, at 12a.

68 Id.

that Mosaic civil legislation is an objectively rational social structure with universal application.[69] On the other hand, this school of thought denies any aura of divine legitimacy to existing systems of government since non-Jewish judges or legislators are hardly likely to inquire about or apply the details of Jewish civil law. This school of thought, therefore, views the obligation of *dinin* as a prescriptive command that only rarely will be fulfilled. Noahide law reflects, for this school, a true aspirational system of duties that is independent of non-Jewish normative conduct. It is a utopian model.

According to the second school of thought, *dinin* is a rule of recognition for plural forms of government. This school of thought may be an outgrowth of the view, expressed both in rabbinic narrative and by medieval rationalists, that Sinaitic legislation is a comprehensive divine code, whereas Noahide law, which was a prelude to it, suffers from this absence of detail and specificity.[70] The obligation of *dinin*, therefore, is a delegation of authority to non-Jewish communities to fill in the gaps in Noahide law with human legal activity to order social relations among men. This very lack of detail of the Noahide Code has a pluralizing tendency. Other legal communities must enact their own sets of laws. The command of *dinin* is thus transformed into a statement about the legitimacy of the activity of human law-creation and enforcement in its diverse aspects. Human legal activity fulfills a divine command. For this school of thought, then, the command of *dinin* is more descriptive than prescriptive because existing non-Jewish governmental activity generally can fulfill the obligation. As will become clearer in Part V, this interpretation of *dinin* paves the way for greater interaction between non-Jewish legal orders and the Jewish legal system.

III. THE OBLIGATION OF NON-JEWS TO PRESERVE THE SOCIAL ORDER

Two of the most interesting questions raised by rabbinic interpretations of the Noahide command of *dinin* are: (1) Whether there is a conceptual principle that explains why both schools of thought define the Noahide adjudicatory system differently from the Mosaic system; and (2) assuming (as does the second school of thought) that Noa-

[69] Saadya, some contend, held that Judaism's parochialism was only ephemeral and that in the messianic age the written and oral law would be recognized as universally valid by all societies. See Funkenstein, supra note 4, at 87, 95; Novak, Natural Law and Normative Judaism, 6 Vera Lex no. 2, at 33 (1986).

[70] See, e.g., J. Albo, supra note 4, at III.19. For the midrashic treatment, see Exodus Rabbah 30:9 and Song of Songs Rabbah 1:5.

hides are free to determine the contents of their systems of civil governance, whether there are any requirements implicit in the command of *dinin* that limit the nature of the legal code that may be adopted.

Professor Rakover, in his contribution to this volume, answers both questions by concluding that the Noahide procedural and civil legal system is intended to reflect the requirements of "natural law". The distinctions between "natural human law" and scriptural law account, according to Professor Rakover, for the differences imputed to the Noahide and Sinaitic criminal adjudicatory system. Moreover, the requirements of "natural law" determine the legality of Noahide systems of governance. Professor Rakover's thesis deserves serious attention on two counts. First, his inquiry calls attention to rabbinic opinions on the topic of *dinin* as a significant and, until now, unexplored source of information about the legal and political philosophy of rabbinic Judaism. Second, his thesis tends to suggest that rabbinic Judaism endorsed natural law theory—at least, as a means of validating non-Jewish systems of law.[71]

This section is an elaboration and critique of Professor Rakover's account. In the next section, I suggest an alternative emphasis. By focusing on the underlying purposes of the Noahide and Sinaitic judicial systems and the different goals of the two Codes of law, other explanations emerge for why the distinctive rules of evidence and procedure of the Sinaitic judicial system were not viewed as elements of the Noahide Code.

A. *Professor Rakover's Thesis*

Professor Rakover's contribution to this volume is the first comprehensive collection of rabbinic opinions on the topic of *dinin*, an invaluable source for future studies of Jewish law. In addition to systematizing these opinions, Professor Rakover undertakes an analysis primarily of the second school of thought, which holds that the command of *dinin* authorizes non-Jews to obey the conventional laws of society.[72] The important issue Professor Rakover seems to be strug-

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[71] See the intriguing comment of Bernard Jackson:

> We conventionally address this issue [of Noahide law] in terms of Jewish endorsement of gentile *law*, i.e., the rules of gentile law, whether for purposes of Jewish validation of gentile systems or conflict of law situations or indeed as a means to fill gaps or interpret difficulties in the *halakhah* itself. It would surely be no illegitimate extension of such enquiries to ask to what extent Judaism thereby also endorses the underlying values of secular theories *about* law?

Jackson, Secular Jurisprudence, supra note 41, at 18-19 (emphasis in original).

[72] Professor Rakover apparently assumes that the dispute between the two schools of thought about the scope of *dinin* is not confined to matters of substantive law, but also extends to matters of procedure. Therefore, according to the first school of thought, Noahide proce-

gling with is whether there are moral limits on the kind of rules governments may enact to fulfill the obligation of *dinin*. He views the rabbinic elaboration of the Noahide procedural system as, in part, a descriptive account of human systems of governance. He states, for example, that "the rules of procedure and evidence mentioned [in the Talmud for Noahides] are taken to be rules of natural human law."[73] Professor Rakover contends therefore that the obligation of *dinin*, as elaborated by the rabbis, also contains a particular vision of the nature of legal rules that non-Jewish societies may create. Professor Rakover seems to be arguing that, even for the second school, there is a prescriptive element to the obligation of *dinin*. The command of *dinin* authorizes non-Jewish societies to create and enforce only those rules of procedure and substantive law that conform with "natural law" and reason.

Professor Rakover begins his analysis by asserting that the Noahide laws in their entirety reflect the "natural law" and were so understood even within the traditional rabbinic framework.[74] Precisely what "natural law" connotes for Professor Rakover here is unclear since he does not define this term. The rabbinic statements he offers to bolster the notion that the Noahide laws are understood within that tradition as a doctrine of natural law, are primarily comments on the intelligibility or universality of the seven headings of the Noahide laws.[75] Professor Rakover puts particular emphasis, however, on R. Nissim Gaon's statement that not all the Noahide laws "really required revelation"; some are "rooted in native intelligence."[76] While R. Nissim's comments suggest, on the surface, a rabbinic conception of the Noahide doctrine that is consistent with classical definitions of natural law, he confines his statement to only three Noahide commandments: the prohibitions on homicide and theft, and the positive obligation to believe in God. As Rabbi Bleich has shown, the prescriptions against homicide and theft sometimes are viewed within the rabbinic tradition as substantive legal obligations that could have been

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dural and substantive civil law should be governed by the dictates of Sinaitic legislation, unless Sinaitic law specifies differential treatment of Jews and non-Jews. According to the second school, Noahides are free to adopt their own rules of substance and procedure.

73 N. Rakover, The "Law" and the Noahides 6 (September 1989) (text of Professor Rakover's oral presentation at this conference; on file with the Cardozo Law Review).

74 Rakover, supra note 1, at 1074-75, 1081, 1086-88.

75 Professor Rakover quotes with approval R. Kook's interpretation that the wise man who observes the Noahide laws solely because they are rational has attained the highest level of spiritual accomplishment. See supra note 47 and accompanying text. He concedes, however, that R. Kook's formulation "changes Maimonides's meaning entirely." Rakover, supra note 1, at 1088.

76 R. Nissim Gaon, supra note 30.

grounded solely in reason or logic (*sevarah*), had there been no divine commandments.[77] Belief in God is, of course, *a priori* in the Jewish legal system. Given these limitations in the rabbinic discussion of the seven Noahide commandments, there is no new compelling evidence offered by Professor Rakover here for classifying the Noahide laws as a rabbinic doctrine of natural law.

Professor Rakover's principal thesis, however, is not necessarily dependent on viewing the seven Noahide laws as a doctrine of natural law. First, even if the seven broad categories of Noahide law are discoverable solely through reason and obligatory on that basis, it does not necessarily follow that all laws enacted pursuant to the command of *dinin* must be grounded in a similar jurisprudential philosophy. Even positivists are prepared to grant that there may be in all legal systems a set of minimum natural law criteria.[78] Conversely, Professor Rakover is contending that the details of the Noahide legal system are filled in, pursuant to the obligation of *dinin*, by human legal activity. Thus, while the seven Noahide laws may be grounded in divine revelation, the laws Noahides are authorized to enact pursuant to the command of *dinin* are man-made. The question remains therefore whether these man-made rules, to fulfill the command of *dinin*, must conform to particular standards, such as objective or "universal" reason.

Professor Rakover's particular conception of natural law emerges more clearly from his description of the Noahide adjudicatory system as a "natural law" system of governance that is both man-made and based on rules that are objectively rational. This is reminiscent of Hermann Cohen's interpretation of the Noahide laws. The obligation of *dinin*, as Cohen saw it, was not simply a provision for the enforcement of Noahide law but rather a rule of recognition for the creation of an objectively rational civil law.[79] Professor Rakover attempts to ground this thesis in the rabbinic sources themselves, an endeavor Cohen did not pursue.

For example, Professor Rakover states that the rabbis of the Talmud did not impose the two-witness rule on Noahides because "[n]atural law . . . does not require such restrictions . . . ."[80] Professor Rakover implies here that the rabbis deemed it rational to condition a finding of guilt on the testimony of only one witness and therefore imposed a one-witness rule on Noahides. By contrast, the Sinaitic

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77 Bleich, supra note 33.

78 H. Hart, The Concept of Law 181-207 (1961).

79 See H. Cohen, supra note 12, at 122-23.

80 Rakover, supra note 1, at 1087.

requirement of two conforming witnesses was not viewed by the rabbis as grounded in rational considerations; rather, the two-witness rule was deemed a formal requirement based on scriptural analysis and, hence, unnecessary for Noahides. Professor Rakover analyzes the question whether confessional evidence may be admissible in Noahide courts in similar fashion. The exclusion of confessional evidence in the Sinaitic legal system is based on objectively rational considerations, according to Professor Rakover.[81] It is an unreliable method of determining guilt. Professor Rakover therefore concludes that rabbinic opinions excluding confessional evidence from the Noahide system do so because the Noahide system must be defined in terms of the requirements of universal reason.

Professor Rakover contends, if I read him correctly, that this conceptual framework was intended to govern the content of the Noahide substantive civil code as well. The substantive provisions of the Noahide civil code must be derived through logical analysis and must be tested against the standard of "reason." Here, Professor Rakover makes the cogent point that human legal activity can fulfill a divine command only if the laws enacted are moral. As he puts it: "[If] the simple establishment of legally binding norms qualify as fulfillment of the commandment of *dinim* . . . it follows that the citizens of Biblical Sodom and those of a modern-day Sodom, such as Nazi Germany, fulfilled the commandment of *dinim* simply by transforming their immoral *Weltanschauung* into legislation!"[82] The obligation of *dinin* cannot possibly be construed as an authorization to enact any substantive rules society sees fit. Conformity to the requirements of objective reason and the "natural law" seems to give the laws enacted in fulfillment of *dinin*, for Professor Rakover, their necessary moral content. The government contemplated by the command of *dinin*, then, is that of the perfect legislator who, free of the constraint of Scripture and exegesis, discovers through reason alone those objective laws suited for the establishment of an orderly, just society.

Professor Rakover does not claim that this method of discerning legal norms is characteristic of rabbinic elaboration of the Sinaitic Code. Rather, he asserts, the rabbis adopted a so-called "natural law" jurisprudence in defining the procedural requirements of non-Jewish systems of law. The rabbis deduced the procedural rules of rabbinic courts primarily through textual analysis and the application of au-

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81 Id. at 1112-13. He cites Maimonides's tentative suggestion that confessional evidence is inadmissible because it may be the product of a confused mind. Maimonides, The Code of Maimonides, Laws of Sanhedrin, 18:6.

82 Rakover, supra note 1, at 1089.

thoritative rules of exegesis. These textually-derived rules, however, also may have a rational component. Professor Rakover links the rational component of the Sinaitic Code to the Noahide legal system through a comprehensive schema. All Jewish legal rules that are the result of pure logical analysis should have universal validity and scope and should apply to Jews and Noahides. Rules that have their source in Scripture and exegesis should apply only to Jews.[83] This is natural law in its classical sense then: rules of reason with universal application. If true, this is an extremely interesting account of an internal pluralism in Jewish law. It is a pluralism of jurisprudential method applied to two different codes contained in the Jewish legal system.

B. *Critique of Professor Rakover's Thesis*

Professor Rakover's search for a governing principle of legality implicit in the command of *dinin* is valid and important. Nevertheless, his theory that the Noahide and Sinaitic Codes are based on two fundamentally different jurisprudential methodologies—one on logical analysis, the other on the hermeneutic enterprise—seems unsupported by talmudic opinions defining *dinin*. For example, the Noahide requirement of one witness, rather than two, quoted in the *Book of Aggadah deBei Rav*, is not described in any of the sources as the product of pure logical anlysis. The Talmud suggests that the rule is compelled by a verse in *Genesis* 9:5, thus rooting it in exegetical method.[84] It is, of course, entirely plausible that the exegetical derivation is imposed on an underlying conceptual framework. But, as I discuss in the next section, the conceptual underpinning of the Noahide judicial system is not primarily objective reason. Rather, the Noahide system of adjudication seems to be suited to the purpose of the Noahide obligation of *dinin*: social control and conventional enforcement of norms; whereas the Sinaitic model of adjudication proceeds from a different conception of judicial justice. Similarly, the only view preserved in a version of the Palestinian Talmud about the admissibility of confessional evidence as a basis for conviction in Noahide courts holds that such evidence is admissible.[85] Moreover, it is not at all clear that confessional evidence is excluded from the Sinaitic legal system because it is an unreliable basis for determining guilt. A recent study of the admissibility of confessional evidence in Noahide courts concludes that such evidence is excluded in the Sinaitic legal system because of certain presumptions of testamentary incapacity

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[83] Id. at 1087.

[84] Babylonian Talmud, Sanhedrin 57b.

[85] See supra note 53.

applicable only to Jews.[86] Finally, there are certain procedural rules in the Jewish legal system that are clearly derived in the Talmud on the basis of logic alone (*sevarah*), such as burdens of proof.[87] But there is no indication that the rabbis viewed these rules as universally applicable in all procedural systems.

Rabbinic opinions of the medieval period also do not mention objective reason as a criterion for validating the rules of non-Jewish legal systems. The *Rema* describes the school of thought that non-Jewish societies are free to adopt their own laws in fulfillment of *dinin* as holding that each society should follow the conventional or customary laws (*nomoi*) of governments.[88] The *nomoi* are local laws rather than universal rational rules. As the *Rema* states in describing this school of thought: "Noahide law is purely a law of social accord."[89] R. Anatoli is even more explicit in describing *dinin* as a command to enact and obey the individual laws and customs of each nation, suitable to the times and temperaments of each society.[90] Similarly, the *Netziv*, who also held that non-Jewish judges are commanded pursuant to the obligation of *dinin* to judge in accordance with their own laws and customs, contended that confessional evidence was a proper basis for conviction in Noahide courts—precisely because it is a customary form of evidence among the nations.[91]

Both the absence of explicit reference in medieval responsa to objective rationality as a criterion for judging the validity of the rules of non-Jewish law and the assumption that non-Jewish customary law will satisfy the obligation of *dinin* are consistent with medieval Jewish philosophic discourse on the relative merits of natural and conventional theories of law. The theory Professor Rakover advances that all Jewish legal rules of substance and procedure that are rational, rather than exegetically determined, should have universal application leads to a static, determined conception of legal relations, one that is detached from historical and social context. As contemporary critics of natural law theory assert, even if it were possible to deduce through the exercise of reason universal principles of individual behavior or social organization, it might not be desirable to do so because it denies cultural practice.[92] Several of the medieval rationalists seem to have anticipated this criticism by several centuries. The de-

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86 See generally Kirschenbaum, supra note 53, and discussion infra note 144.

87 For a summary of these rules see Bleich, supra note 33, at 11-12.

88 *Rema*, supra note 59.

89 Id.

90 J. Anatoli, supra note 60, at 72a.

91 *Netziv*, supra note 60.

92 See, e.g., M. Sandel, Liberalism and the Limits of Justice 172-73 (1973) (criticizing

tails of social life, as Maimonides and Albo imply,[93] are the product of convention, not abstract reason. Maimonides suggested that the political leader who imposes the *nomoi* or conventional law of the nation or the city, taking into account the needs of the time and place, effectively orders social relations among men better than the philosopher.[94] It is, in any event, because man has access to divine regulation[95] (whether embodied in the Sinaitic Code or the Noahide Code) which alone, according to Maimonides and Albo, provide the certain content of basic moral rules necessary for a well-ordered political life, that the details of social regulation can be left, where there are gaps, to social convention. The *nomoi* imposed by a political leader, while falling short of the aim of divine law (intellectual and spiritual perfection), nevertheless can lead men to the "first perfection"—the instrumental ordering of social relations.[96]

Kant's idea of reason); see also Stone, Social Dimensions of Law and Justice 86-163 (1966) (account of the historical school of the eighteenth and nineteenth centuries).

93 I base my analysis here primarily on the writings of Maimonides and Albo because they consider (though not in detail) the nature of other forms of governance. On the virtual absence of general or comparative legal speculation in classical Jewish legal literature, see supra note 4 and accompanying text.

94 Maimonides argued that human nature is so diverse that misery or strife is inevitable. Therefore, a political leader must emerge to impose the conventions of society on its members so that the community will be well-ordered. 2 Maimonides, The Guide of the Perplexed 381-85 (S. Pines trans. 1963) (part II ch. 40). See generally Goodman, supra note 14.

The political leader of the city or the country described by Maimonides is not necessarily a philosopher. The political leader has the faculty to compel people to observe and adopt the *nomoi*. Thus, the faculty of ruling rather than the speculative faculty guides him in laying down the *nomoi* his society is to follow. Maimonides, supra. These man-made *nomoi* are not abstractly rational or universal principles of law; they are the conventions of the particular society suitable to that time and place. Id. The man-made *nomoi* are rational in the sense that they are purposive and have practical utility.

Maimonides's assessment of human nature is also a clue to his legal and political philosophy. Legal theories seem to differ in their understanding of the basic ingredients of human nature. Classical natural law theory tended to portray man as endowed with original virtue, whether by birth or divine grace. See E. Cahn, The Sense of Injustice: An Anthropocentric View of Law 7 (1949). Classical Jewish literature describes the nature of man in much less optimistic terms. The Mishnah instructs Jews to pray for the well-being of the government "for were it not for the fear of it, a man would swallow his neighbor alive." Mishnah, Avot 3:2. The Babylonian Talmud, Avodah Zarah 4a, elaborates: "Just like the bigger fish of the sea swallows its fellow, so with human beings; if it were not for the fear of the kingdom, every bigger one would swallow his fellow." This view of the nature of man, echoed by Maimonides, logically leads to the notion that society needs the structure of positive law to prevent chaos—just as it did later for Thomas Hobbes. See generally Alexander, Beyond Positivism: A Theological Perspective, 20 Ga. L. Rev. 1089 (1986).

95 See Maimonides, supra note 4.

96 Maimonides, supra note 94. As Strauss clarifies, Maimonides contrasts the *nomoi* with divinely-revealed law. The former is directed only toward the well-being of the body and is unconcerned with divine things. "The *nomos* is, then, to use Wolfson's expression, essentially the order of a 'civil state' as distinguished from a 'religious state.'" Strauss, supra note 4, at 124.

Albo's analysis of the goals of "natural" and "conventional" legal systems provides one of the only explicit Jewish philosophic statements about the relative merits of customary law and natural law in its classical sense.[97] For Albo, natural law has a limited function. The purpose of natural law is the avoidance of theft and murder and the encouragement of human association.[98] "Natural law" leads men to group in society and place themselves under the authority of a political leader who transforms the conventions of the city into positive law. In contrasting natural law, "which is the same among all peoples at all times, and at all places," with conventional law, "which is ordered to suit the place and the time and the nature of the persons who are to be controlled by it,"[99] Albo contends that the latter is superior to the former. Natural law is not sufficient to order the needs of men and control their social life. Conventional law, however, does achieve the good ordering of human society by prohibiting what is "undesirable according to human opinion" and developing practical means to encourage people to engage in desirable behavior.[100] The customary or conventional law accomplishes this goal because it is suited to the cultural and historical situation of each society. Precisely because the *nomoi* are the product of particular groups in concrete historical settings, conventional law, more than natural law, stresses human freedom of choice and purpose.[101]

This historical perspective is also evident in Maimonides's search for the reasons of the six hundred and thirteen commandments. Maimonides held that the broad outlines of the commandments were objectively rational. Many of the details of the commandments, however, can only be understood in light of the concrete historical and cultural situation of Israel.[102] Indeed, even in Mosaic legislation, which is more detailed than Noahide law and geared solely to one society, the customary law of different Jewish communities occupies a central place in the legal structure.[103] Thus, even the medieval rationalists would have viewed the command of *dinin* as a delegation of authority to each society to fill in the details of social life left open by

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97 J. Albo, supra note 4.

98 Id. at I:5, I:7.

99 Id. at I:7.

100 Id.

101 Id. at I:9. The conventional law is, however, inferior to the divine law because the former "cannot tell what is proper in a given case"—i.e., it does not address details such as what may be eaten—and because it is based on an imperfect human understanding of what is desirable and undesirable. Id. at I:8; see also D. Novak, supra note 13, at 319-50.

102 See generally I. Twersky, supra note 49, at 374-447; Funkenstein, supra note 4.

103 For the role of custom in Jewish law, see E. Urbach, supra note 55, at 31-41; see also Elon, *Minhag* (Custom), 12 Encyclopaedia Judaica 3-26 (1972).

Noahide law in light of its customary law.[104]

In sum, rabbinic interpretations of Noahide *dinin* should not be construed as a rabbinic directive to non-Jewish societies to create a classical "natural law" system of governance or as an attempt to universalize a set of supposedly rational norms distilled from the corpus of Jewish law.

C. *Noahide Dinin as a Rabbinic Articulation of Governmental "Legality"*

Professor Rakover is right to assert, however, that rabbinic interpretations of the command of *dinin* cannot be read solely as validations of any and all conventional rules of government. Surely the rabbis assumed that there is a standard implicit in the command of *dinin* to which human legal activity is held. I would like to discuss two ways in which rabbinic opinions on the topic of *dinin* attempt to articulate the formal requirements of legal systems of governance. One is the rabbinic link of the command of *dinin* to the ideal of *tikkun olam* (improving the social order). The second is the rabbinic association of the command of *dinin* with Abraham's command to do "righteousness and judgment."[105]

There are a number of instances in Jewish law where an ultimate value is identified to inform decision-making in a variety of situations and contexts where it is impossible to list all specific rules of conduct or decision.[106] Nahmanides explains this particular legal technique. Commenting on the biblical phrase "to do the right and the good," he notes that it is impossible to mention in the Torah all commercial activity and all social and political institutions. "So after [God] has mentioned many of them . . . He resumes to say generally that one should do the good and the right in all matters . . . ."[107] As one legal scholar has put it, "the halakhic norm is itself situational. . . . The metaphors employed to describe it . . . denote purpose and direction

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104 As noted, there is a dispute among later authorities whether Maimonides held that Mosaic substantive civil law applied to non-Jews pursuant to the command of *dinin* or whether he held that non-Jews were free to develop their own systems of jurisprudence. See supra notes 62-63 and accompanying text. An analysis of Maimonides's legal philosophy suggests that he may well have held the latter view.

105 Genesis 18:19. This point is also made in Rakover, supra note 1, at 1089.

106 See Lamm & Kirschenbaum, supra note 33, at 132 (listing "thirteen values and ideals which serve as constant antidotes to excessive formalism," including the ideal of *tikkun olam* discussed infra notes 110-13 and accompanying text). For a discussion of whether these "normative principles of a high level of generality" are akin to Ronald Dworkin's concept of "legal principles," see Jackson, Jewish Law or Jewish Laws, 8 Jewish L. Ann. 15, 33-34 (1989).

107 Nahmanides, 2 Commentary on the Torah 376 (Chavel ed. 1971) (commenting on Deuteronomy 6:18).

rather than definitely prescribed acts . . . . [The] focus is axiological and teleological."[108]

Rabbinic opinions on the topic of *dinin* use this legal technique to set forth the goals and formal limitations of non-Jewish systems of governance. Several opinions identify a general rationale or telos for the command. Maimonides construed the obligation of *dinin* as a command to preserve social order through judicial enforcement of norms, in accordance with methods of procedure suited to social control. In Maimonides's powerful phraseology, courts must be established to punish those who violate Noahide law "so that the world will not be destroyed."[109] Others give this principle a positive rather than negative formulation.[110] Non-Jewish governmental activity is for the purpose of *tikkun olam*, the preservation of the social order.[111] The term *tikkun olam* (literally, to repair the world) refers to the process of achieving peace and harmony in social life through legal activity. While the term *tikkun olam* appears in a variety of contexts in classical rabbinic and medieval sources, its precise connotations are still not entirely clear. The Jewish concept of preserving the social order appears to bear little resemblance to the classical natural law doctrine about God's providential and unchanging order.[112] In the Mishnah, the term is used as a general justification for adopting various social welfare legislation (*takkanot*). Thus, the ideal of *tikkun olam* implies the process of adjusting laws to historical and contingent circumstances so that men can live in social harmony.[113] In the com-

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[108] Lichtenstein, supra note 36, at 79.

[109] Maimonides, The Code of Maimonides, Laws of Kings 10:11.

[110] Although the negative formulation may be more precise in light of the Talmud's articulation that the Noahide commands are structured around negative, rather than positive commandments, see infra notes 142-43 and accompanying text, it is unclear whether there is a substantive difference between the positive and negative formulations.

[111] See R. Nissim of Gerona, Derashot haRan, Eleventh Homily, (describing non-Jewish governmental action as *tikkun siddur hamedini*, the preservation of governmental order); J. Anatoli, supra note 60, at 72a (describing the purpose of the command of *dinin* as *yishuv olam*, the establishment of the social order). Compare Maimonides, The Code of Maimonides, Laws of Kings 3:10 (describing the power of the Jewish king to punish those who engage in socially reprehensible behavior in order to preserve social order) with M.S. haCohen, supra note 3 (the Jewish king's powers derive from the Noahide Code).

[112] While there is a notion of "created order" in the Talmud, the term for that is *beriyato shel olam*. See, e.g., Babylonian Talmud, Yevamot 61b. This concept refers to man's relationship with God, and not man's obligations to society. See Novak, Natural Law, Halakha and the Covenant, 7 Jewish L. Ann. 43, 54 n.37 (1988).

[113] See Mishnah Gittin 4:2-5:3; see also infra notes 188-89 and accompanying text.

The terms *tikkun olam* and *takkanah* (legislation) seem to share the same etymological derivation. The Aramaic root word for both *tikkun* and *takkanah*, *takken*, means to adjust or straighten. See Urbach, supra note 55, at 7-8. *Takkanot* adjust laws to changed circumstances. They "straighten out" irregularities which have developed over time. Id. at 7. In this sense, they share some of the characteristics of the Aristotelian doctrine of equity. On *takka-*

mentaries of Maimonides and the other medievalists cited above, the term evokes, in addition, the notion of law as an instrument of achieving social order. The world is sustained by the effective judicial enforcement of norms. This articulation of the legitimate basis of governments has its antecedents, too, in the Mishnah and Talmud. The Mishnah, foreshadowing the political theories of Thomas Hobbes, exhorts Jews to pray for the well-being of the government "for were it not for the fear of it, a man would swallow his neighbor alive."[114] Thus, by associating the principle of *tikkun olam* with the Noahide obligation of *dinin*, medieval jurists imply that the divine legitimacy of non-Jewish governments rests, in part, on their commitment to coerce divinely-mandated standards of behavior and thus secure social peace.

At the same time, rabbinic opinions on the topic of *dinin* attempt to define the formal limitations on the authority of governments to coerce socially desirable behavior. Again, the rabbis employ the rabbinic technique of identifying an ultimate value to limit decision-making and legal activity. The rabbis associate the command of *dinin* with the biblical ideal to do "righteousness and judgment." This phrase appears in the verse (*Genesis* 18:19) that the *Amora* R. Yohanan cited in the Talmud as a proof-text for the obligation of *dinin*. The *Rema* connects the school of thought that interprets *dinin* as a command to follow the conventional laws of government to this very verse.[115] The biblical phrase "righteousness and judgment" appears to be a juridical expression intended to convey the additional requirements a legal system must fulfill to achieve justice. Depending on the particular context in which the phrase appears, these requirements may concern the content or intent of the laws enacted or the attributes of the judiciary.[116] In the context of the obligation of *dinin*, the biblical ideal to "do righteousness and judgment" appears to be

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not and the authority to enact social legislation in Jewish law, see generally The Principles of Jewish Law (M. Elon ed. 1975); Elon, *Takkanot*, 15 Encyclopaedia Judaica 712-28 (1972).

The term *tikkun olam* also appears in an entirely different guise in Jewish medieval mystical sources. In Lurianic kaballah, *tikkun olam* refers to the process of repairing the broken spheres of heaven. See G. Scholem, Major Trends in Jewish Mysticism 244-86 (1961).

For the theory that the ideal of "*tikkun olam*" is a substantive obligation in Jewish law authorizing occasional departures from the Sinaitic rules of procedure, see Part V of this article.

A full treatment of the concept of *tikkun olam* in Jewish thought is a scholarly desideratum.

114 Mishnah Avot 3:2; Babylonian Talmud, Avodah Zarah 4a; see also supra note 94.

115 *Rema*, supra note 59.

116 Bazak, The Meaning of the Term "Justice and Righteousness" in the Bible, 8 Jewish L. Ann. 5 (1989); Faur, Law and Justice in Rabbinic Jurisprudence, Samuel K. Mirsky Memorial Volume 19-20 (1970).

addressed to the judge. In describing the second school of thought, the *Rema* writes that *dinin* obligates the judge to adjudicate between persons equitably. The focus on the role of the judge in the doing of justice (a prime topic in the Bible) is implicit in the talmudic discussion of the command of *dinin*, which is confined to elaborating the judicial or procedural aspects of the command. The Talmud also hints at how judicial institutions should be structured to achieve good social order. Courts must be established, honest judges must be appointed, there must be an evidentiary basis for the assessment of guilt and punishment must be the result of judicial process and not the private enforcement of norms. These requirements are, of course, commonplace.[117] Yet, Judaism's early preoccupation with institutional justice and judicial process is, for many, one of the major contributions Judaism made to civilization.[118]

One of the more innovative modern contributions to the old tradition of natural law is Fuller's concept of "procedural natural law."[119] Unlike his predecessors, Fuller rejected the idea that there is an ideal legal system that natural law theories of justice can produce. He confined his work to articulating what he termed the internal principles of law that characterize all "legitimate" laws. These procedural rules of legality do not determine the justness of individual norms of substance. "They are conditions that have to be satisfied to be successful at the enterprise of law-making, achieving a legal system."[120] Fuller described his conditions as an "ideal of legality" because they test whether a government is acting legitimately or arbitrarily and set a standard for when citizens have a duty to obey the positive commands of the sovereign. Governments can adopt and enforce positive or conventional "made law"[121] only if the conditions of legality first are satisfied.

Rabbinic opinions on the topic of *dinin* seem to be grounded on a similar perspective, although they proceed in accordance with models

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117 Precisely how innovative (or reactive) these requirements are must be looked at in the light of history and comparative law, a subject well beyond the scope of this paper. It is noteworthy, however, that the ancient civil procedure of the Romans, for example, is described by one comparativist as "nothing more than a form of regulated self-help." B. Cohen, supra note 15, at 624 n.4.

118 The late Julius Stone once called for the understanding of law as an expression of the unique "sense of justice" inherent in each particular legal system. Stone, supra note 43, at 312-13. Judaism's deep concern with the due process of law is one example of the particular "sense of justice" inherent in the Jewish legal system. For an example of this method applied to the American legal system, see E. Cahn, supra note 94.

119 L. Fuller, The Morality of Law (1964).

120 Golding, Jurisprudence and Legal Philosophy in Twentieth Century America—Major Themes and Developments, 36 J. Legal Ed. 441, 478 (1986).

121 Id. at 474.

that are intrinsic to the Jewish legal system. The rabbis are transmitting revealed principles that should govern the activity of law-creation and enforcement in non-Jewish societies. The association of the command of *dinin* with both the ideals of preserving order in society and doing righteousness and judgment assumes committed legal behavior. Non-Jews are obligated to act purposively in structuring a legal system to eradicate criminal conduct, achieve peace and harmony among men, and render equitable judgments. Like Fuller's internal principles of law, these ideals associated by the rabbis with the command of *dinin* do not serve to test individual norms of substance non-Jewish governments may adopt. Rather, they are conditions that have to be satisfied before non-Jewish legal activity will be deemed "legitimate" law. Indeed, compliance with these principles implicit in the command of *dinin* is a condition precedent for the reception of non-Jewish law into the Jewish legal system.[122]

IV. TWO MODELS OF JUDICIAL JUSTICE

Thus far, I have concentrated on how rabbinic opinions construing the Noahide commandment of *dinin* can be understood as an articulation of the aims and formal requirements of non-Jewish systems of law. This section contrasts the aims of Noahide law with the goals of Torah law, using the Noahide and Sinaitic judicial models as my focus.

The talmudic description of the Noahide system of criminal adjudication captures our attention precisely because it is antithetical to the procedures stipulated for the rabbinic courts. Professor Rakover has contended that the talmudic rabbis did not impose the Sinaitic model of adjudication on Noahides because that model exceeded the requirements of "natural law." The Sinaitic two-witness rule and the rule of prior warning, he implies, are basically nonrational methods of arriving at a determination of guilt or innocence. They are dictated by scriptural interpretation. The Noahide model, by contrast, is

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[122] Thus, non-Jewish legal activity must satisfy the conditions of "legality" outlined in the text before the doctrine of *dina de-malkhuta dina* ("the law of the state is the law") can be invoked. See generally S. Shilo, Dina De-Malkhuta Dina (The Law of the State is the Law) (Heb.) (1974). In addition to judicial honesty and procedural regularity, medieval jurists adopted another principle for judging the legality of non-Jewish legislation. Governmental enactments must apply equally to all within the jurisdiction and may not be imposed in a discriminatory or arbitrary fashion. This principle of equality, though not discussed in opinions concerning the command of *dinin* per se, was articulated to distinguish between legitimate and arbitrary non-Jewish governmental enactments for purposes of deciding when the doctrine of *dina de-malkhuta dina* applies. See Maimonides, The Code of Maimonides, Laws of Theft and Lost Objects 5:11; see also Shilo, Equity as a Bridge Between Jewish and Secular Law, 12 Cardozo L. Rev. 737 (1991).

based on formally rational rules of procedure. As noted, however, the Talmud roots some of the Noahide procedural rules in the pre-Sinaitic scriptural text. But, more importantly, it is difficult to accept Professor Rakover's initial classification of the Sinaitic rules of procedure as nonrational in contrast to the procedural rules imputed to the Noahide Code. The rationality of legal rules should be assessed in light of the larger, systemic goals they are intended to further. The two judicial models should be analyzed therefore in light of the differing goals of the Noahide and Sinaitic Codes, as the rabbis perceived them.

There is little direct discussion in rabbinic texts of the conceptual basis of the Noahide Code. It is possible, however, to draw some conclusions about the structure and purpose of the Noahide Code by focusing on the different obligations imputed by the rabbis to the two Codes. For the difference between the two adjudicatory systems is just the tip of the iceberg. For example, many of the Torah's precepts that are not strictly ceremonial or ritualistic, such as the obligations to give charity, issue Jewish legal divorces,[123] or procreate,[124] are not deemed a part of the Noahide Code. More significantly, some of the capital crimes in the Noahide Code, like the prohibitions against feticide and indirect killings,[125] are not punishable offenses in the Sinaitic Code. Other Noahide obligations differ in detail from Mosaic legislation and often are applied more leniently for Jews than Noahides. For example, non-Jews are culpable for theft if they steal a *de minimis*[126] amount and for eating a limb of a live animal if they eat a morsel.[127] Jews do not commit a punishable offense unless they steal more than a *prutah*[128] or eat more than a fixed measure.[129]

Two emphases are possible in understanding this array of differences between the two Codes. The first, adopted by several modern scholars, is to treat the differences between the two Codes as largely determined by historical and sociological factors. Some claim that the details of the Noahide Code differ from Sinaitic law because the for-

123 Maimonides, The Code of Maimonides, Laws of Kings 9:8.

124 The Talmud states explicitly that Noahide law does not contain this obligation. Babylonian Talmud, Sanhedrin 59b. A minority opinion of the school of *Tanna deBei Menashe* implies the opposite. Babylonian Talmud, Sanhedrin 56b-57a. Maimonides does not include the obligation to procreate in his codification of Noahide law. But there are other authorities who disagree. See, e.g., Nahmanides, supra note 54, at 133-35 (commenting on Genesis 9:5); see also Lichtenstein, supra note 13, at 51-52, 95 (summarizing the opinions).

125 Babylonian Talmud, Sanhedrin 57b; Maimonides, The Code of Maimonides, Laws of Kings 9:4.

126 Babylonian Talmud, Eruvin 62a.

127 Babylonian Talmud, Hullin 102b; Maimonides, The Code of Maimonides, Laws of Kings 9:10-11.

128 Babylonian Talmud, Eruvin 62a. A *prutah* is an ancient small coin.

129 Maimonides, The Code of Maimonides, Laws of Kings 9:10.

mer were defined in the Talmud in terms of laws customary among Roman society.[130] For one group, the Noahide prohibition on feticide mirrors Roman laws against abortion[131] and the Noahide judicial system mirrors Roman procedural law.[132] For others, the rabbis "forced" exegesis in deriving these laws to "render judgment against the Romans" who supposedly engaged in rampant abortions[133] and punished offenders without requiring testamentary evidence to support conviction.[134] Still other academics hold that the entire Noahide system of law as presented in the Talmud is a hastily-drawn sketch of a legal system, part of a rudimentary attempt to construct a social theory in which to fit Roman society.[135] Similar historical and sociological explanations have been offered to explain the two-witness rule and rule of prior warning in the Sinaitic model of adjudication. There are those who view the distinctive criminal law system of the Torah solely as a form of divine service, a method to attain atonement for the convict rather than to arrive at the truth of guilt or innocence.[136] Others have pointed to the fact that many of the rules of judicial procedure were refined after the dissolution of criminal jurisdiction and therefore were "merely theoretical"[137]—perhaps a statement of conscience in reaction to the perceived cruelties of Roman criminal enforcement. Were we to accept all these sociological explanations, we have the possibility of a rarified hypothetical posed by the Talmud

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130 See, e.g., Urbach, supra note 14, at 275-76. If some of the Noahide rules were defined in light of the laws of the Romans, the differences in treatment of Jews and non-Jews can be attributed to a choice of law based on personal status. Cf. Babylonian Talmud, Sanhedrin 57b (indicating that certain transgressions by Noahides committed with Jews such as adultery are judged by Jewish law, including the formal rules of procedure and evidence). See generally Lifshitz, The Rules Governing Conflict of Laws Between a Jew and a Gentile According to Maimonides in Mélanges á la Memoire de Marcel-Henri Prévost 180 (1982).

131 See D. Feldman, Birth Control in Jewish Law 260-61 (1968) (ascribing this view to Leopold Loew and noting that it is historically inaccurate).

132 D. Novak, supra note 13, at 179 (citing Schmeidl, Comparisons Between Roman and Talmudic Law, 10 Hashahar 52 (1880)).

133 D. Feldman, supra note 131, at 259 (quoting I. Weiss, 2 Dor Dor veDorshav 21 (1924)). The Babylonian Talmud, Sanhedrin 57b, links the Noahide prohibition on feticide to an exegesis of Genesis 9:6 and the different culpability of Jews to a verse in Exodus 21:22, which is post-Sinaitic.

134 D. Novak, supra note 13, at 172.

135 Loewe, supra note 6, at 126-27.

136 See generally A. Schreiber, Jewish Law and Decision-Making: A Study Through Time 278 (1979) (citing R. Solomon Ibn Adret (*Rashba*), Responsum no. 74 (attributed to Nahmanides)).

137 Cohn, The Penology of the Talmud, 5 Israel L. Rev. 53, 54 (1970); see also 2 G. Moore, Judaism in the First Centuries of the Christian Era 187 (1962) ("These rules of procedure impress us as purely academic"). See generally Kirschenbaum, The Role of Punishment in Jewish Criminal Law: A Chapter on the Penologic Viewpoint of the Sages and Rishonim (Heb.), 12 Iyyunei Mishpat 253 (1987).

about the appropriate contours of two entirely fictitious systems of adjudication.

While we cannot recover the historical situation, this emphasis upon the social circumstance of the talmudic rabbis does not entirely explain the rabbinic presentation of the details of either the Noahide Code or, indeed, the Sinaitic system of adjudication. As seen above, historians disagree on whether the details of the Noahide Code mirror Roman law or are deliberately defined to negate Roman practices. Even if some of the Noahide laws were formulated in terms of customary Roman practice, others were not. The rabbinic decision to validate certain practices and not others presupposes a method of evaluation. More importantly, many of the obligations of the Noahide Code have no relation to Roman life at all. Finally, the structural pattern of the Noahide Code has persisted relatively unchanged from talmudic times. Similar weaknesses inhere in the attempt to understand the Sinaitic system of adjudication as a solely theoretical statement in reaction to Roman procedures. The talmudic presentation of the Sinaitic system of criminal adjudication, for example, suggests that it was viewed by the rabbis as a functioning system of adjudication.[138] The Talmud is preoccupied with the accurate reporting of traditions and records contemporaneous accounts of litigation pursuant to the traditional rules.[139] Moreover, much discussion of the criminal law system takes place in the period immediately following the relinquishment of criminal jurisdiction. This was a time of active political struggle to restore Jewish autonomy including full criminal jurisdiction.[140] There are also discussions in the tannaitic period about how strictly or leniently to apply the evidentiary rules to free a murderer.[141] These debates suggest that the rabbis also did not view the Sinaitic adjudicatory system solely as an academic construct or a mysterious ritual of atonement.

An alternative emphasis is desirable. Instead of viewing the dif-

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138 Schreiber suggests that the Jewish criminal law system may have been an outgrowth of Judaism's early history as a small, relatively harmonious agrarian society. A. Schreiber, supra note 136, at 228.

Whether all the details of the Sinaitic system of criminal adjudication reflect actual practice is open to question, of course. While I believe that there is considerable evidence that the rules of procedure and evidence are grounded in actual practice, there is more reason to question whether the modes of capital punishment, for example, reflect actual practice. See Cohn, Capital Punishment, 3 Encyclopaedia Judaica 145-47 (1972).

139 Id. at 278 n.423 (citing Babylonian Talmud, Sanhedrin 37b and Makkot 7a); see also Babylonian Talmud, Sanhedrin 41a.

140 See Blidstein, Capital Punishment—The Classic Jewish Discussion, 14 Judaism 159, 164 (1985).

141 See infra notes 165-70 and accompanying text.

ferences between the two Codes as largely determined by the Roman occupation, one may hypothesize that these differences are the product of the distinctive conceptual frameworks around which the two legal Codes are organized. It is this approach that I shall pursue here.

There have been few academic attempts to identify a unifying legal or conceptual principle that explains all the differences between the Noahide and Sinaitic Codes. The Talmud does suggest, however, that Noahide legislation is structured around negative rather than positive commandments.[142] It consists primarily of negative duties. Possibly, the Talmud is suggesting that Noahide law is intended to regulate those who live in a political order. Therefore, the law's aim is primarily to prevent social harm. Sinaitic law, on the other hand, defines the relationship of individuals participating in a covenantal community. Therefore, the law is structured around positive as well as negative commandments and reciprocal positive duties owed by one member to another. Hence, unlike the Sinaitic Code, the Noahide Code does not include obligations like giving charity or returning lost property.[143] Some of the positive commandments in the Jewish legal system also flow from the notion that Jews are a holy people, a nation of priests, commanded to preserve this holiness. This status, and the obligations that flow from it, do not apply to non-Jews.

The elaboration of the Noahide Code in the Talmud and later responsa can be seen therefore as part of an intricate process of identifying those aspects of the Sinaitic Code that further particular aspirational goals of the Jewish community (such as to be "holy") but are not necessary for creating a moral political community. Certain differences between the two Codes also may be the product of quasi-legal presumptions formulated by the rabbis about the participants in each of the legal systems and regarded as specific to each system. The difference in the law of theft, for example, is later explained as resting on a convention among Jews to forgive thefts of less than a *prutah*.[144]

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142 Babylonian Talmud, Sanhedrin 58b.

143 This point is similar to that made by the late Professor Samuel Atlas. See S. Atlas, supra note 41, at 36-40. Atlas argues that the obligation to give gleanings to the poor is associated in the Talmud with the new obligations of a convert and is illustrative of the increased responsibilities that are assumed when the convert joins the "*edah*" (covenantal community). For Atlas, the differing obligations of Noahides and Jews identified by R. Yohanan in the Babylonian Talmud, Sanhedrin 57a and Yevamot 47b, were intended to highlight the differing responsibilities of those who are members of only a social community and those who are members of both a social and conventantal community.

144 The Talmud offers an explanation for the differences between the law of theft for Jews and Noahides. Non-Jews are punished for stealing less than a *prutah* because they do not forgive *de minimis* theft. Babylonian Talmud, Sanhedrin 59a. *Rashi* interprets this statement as a comment on Jews rather than non-Jews. He states that there is a convention among Jews to forgive thefts below that amount. *Rashi*, commenting on Babylonian Talmud, Sanhedrin

Similarly, the "defined measures" that determine culpability for Jews are regarded by the rabbis as unique to that system.[145] Moreover, the Sinaitic revelation was deemed to be a fundamental change in the status of Israel. Before Sinai, the Noahide Code governed all humanity. The differences between the Noahide Code and the Sinaitic Code sometimes are associated by the rabbis with this transformation in the status of Jews. Often, the more lenient rules of the Sinaitic Code are interpreted by the rabbis as a sign of God's "mercy on Israel,"[146] a special dispensation tied to the detailed system of obligation imposed on Israel when it accepted the "yoke" of the Torah.

The differences between the Noahide and Sinaitic models of adjudication are intricately tied to the conceptual framework outlined above. The two models of adjudication represent two distinct forms of judicial justice. The essence of the Noahide command of *dinin*, as Maimonides and other medieval jurists later suggest, is the eradication of evil in society through pragmatic (though basically fair) methods of enforcing norms. The laws of adjudication for the non-Jewish nations are intended to preserve social order in political societies. They symbolize social morality, a form of dispensing justice that is realistic, effective and focused on good political government.[147]

The Torah's model of adjudication proceeds from a very different set of assumptions. As is well known, the Torah's procedural and evidentiary rules make it almost impossible for the death penalty to be imposed.[148] It is a system of exceptional leniency to the accused.

59a, s.v. *mishum de lav bnei mehila ninhu*. This interpretation suggests that certain of the differences between Noahide and Sinaitic law have their basis in legal presumptions that are formulated about participants in that particular legal system. See S. Atlas, supra note 41, at 34-36. One of the few academic studies of the differences between the two Codes focuses on confessional evidence, which is inadmissible in the Sinaitic legal system but admissible, according to an opinion in the Palestinian Talmud, supra note 53, in the Noahide system. The author of that study concludes that the rule may be grounded in a legal presumption about the testimonial qualifications of Jews that would not be given universal scope. Kirschenbaum, supra note 53. Certain distinctions in the laws of blasphemy (holding non-Jews culpable for blaspheming the alternative names for God, Maimonides, The Code of Maimonides, Laws of Kings 9:3, while holding Jews culpable only if they blaspheme the Tetragrammaton) also may rest on a quasi-legal presumption about the extent of knowledge of divine attributes in the Jewish community. See A. Lichtenstein, supra note 13, at 75-76 for a discussion of this point.

145 Maimonides, The Code of Maimonides, Laws of Kings 9:10 (fixed measures are provided only for Israelites); see A. Kook, Etz Hadar 1:1 (1967). These fixed measures generally are viewed as special leniencies given only to Israel and tied to the detailed system of obligations to which Jews are subject.

146 M.S. haCohen (Or Sameah), commenting on Maimonides, The Code of Maimonides, Laws of Forbidden Intercourse 3:2. The Or Sameah cites God's mercy to explain the different ages of legal responsibility established for Jews and non-Jews.

147 See generally Blidstein, On Political Structures—Four Medieval Comments, 22 Jewish J. of Soc. 47, 52-54 (1980).

148 The Talmud describes aggressive application of the two witness rule which disqualifies

Moreover, the rabbis were aware that the hardest part of dispensing justice for a human court is in the finding of the facts. The two-witness rule is designed, according to the internal viewpoint of the Talmud, to assure thorough investigation of the facts so as to arrive at the truth. The procedures thus assure that judges will not find themselves guilty of judicial murder through an error in judgment or through acceptance of false testimony. Discussion of the proper application of the Torah's procedural and evidentiary rules in the Talmud suggests that the rabbis viewed them as a desirable method of adjudication for a community whose goals are more aspirational than conventional. In his famous Eleventh Homily, R. Nissim of Gerona reconstructs the traditional rabbinic viewpoint. The Torah's judicial model, he writes, "judges the people in accordance with that which is ideally just in itself, whether or not this suits the needs of society. . . ."[149] It is addressed to the rights of the individual. The Torah's procedural system is part and parcel of a legal structure rooted in ethical ideals of loyalty, devotion and the desire to become like God. It is an ideal or divine form of justice.

One can cull from rabbinic narratives, some dating to the early tannaitic period, three related rationales for why the Sinaitic model of adjudication, despite its seeming focus on the truth-seeking process, would not have been universalized: (1) rabbinic association of the Torah's procedural rules with divine justice and the requirement of *imitatio dei*, a positive aspirational commandment addressed only to Jews; (2) rabbinic ascription of the Torah's unique rules of procedure to the change in the status of Israel at Sinai; and (3) rabbinic assumptions that the Jewish criminal system is suitable to the particular condition of the Jewish community. These narratives, many of which no doubt circulated during the time period in which the Noahide Code was discussed and elaborated, are interpretations of the religious significance and meaning of the Sinaitic judicial system.

Rabbinic narratives compare the quality of mercy in the Jewish criminal system to the merciful form of justice God dispenses. The various names of God appearing in Scripture refer to the different attributes of God, including *Din* or strict justice and *Rahamim* or mercy.[150] Both attributes are combined in the ideal of divine adjudi-

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witnesses to a murder and frees the accused. Babylonian Talmud, Sanhedrin 41a (R. Yohanan ben Zakkai questions murder witnesses about the stems of the figs growing on the tree above the site of the crime). The rule of prior warning makes it virtually impossible to convict any but the most wilful offenders.

149 R. Nissim of Gerona, Derashot haRan, Eleventh Homily.

150 See generally A. Marmorstein, The Names of God in the Bible, in The Old Rabbinic Doctrine of God 41-53 (1968).

cation.[151] At times, the two attributes refer jointly to God and his court.[152] Divine or ideal justice judges the rights of each individual, without consideration of the needs of the community for deterrence or retribution. The command of *imitatio dei*, to become like God, is the cardinal principle of the Torah[153] and explains much of the early rabbinic approach to criminal law enforcement. The rabbis of the *Midrash* exhort the Jewish court to emulate the quality of merciful or ideal justice administered by the heavenly court.[154] *Aggadic* depictions of the Heavenly Court ascribe to it the very requirements the Torah specifies for the rabbinic courts. In the Heavenly Court, God confers with angels before announcing sentence because a truthful judgment is not "the verdict of a single judge."[155] A judge who acts in accordance with the ideals of the Torah's model of judicial justice is a partner with God in the process of creating the universe.[156]

Other *Midrashim* imply that the Noahide judicial model was an earlier universal and harsher model of justice alleviated for Jews when Jews underwent a change in status at Sinai and accepted the Sinaitic covenant. The seven Noahide laws, in rabbinic theology, governed all societies before the Sinaitic revelation.[157] According to a *baraita* cited in the Talmud, God revealed ten laws to Israel at Marah immediately prior to the Sinaitic revelation: the seven Noahide laws, the laws of the Sabbath and honoring one's parents as well as another set of rules also termed *dinin*.[158] In the course of discussing the Noahide laws, the rabbis logically inquire how the Marah revelation could have in-

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151 The Talmud, commenting on the verse in Isaiah 26:21, "For behold God goes from His place," addresses the textual implication that God goes from one place to another. According to R. Meir, the verse refers to God's change of the measure of strict judgment with that of mercy. Palestinian Talmud, Taanit 9a.

152 See E. Urbach, supra note 36, at 156-57.

153 The scriptural basis of this ideal, according to Maimonides, is in Deuteronomy 28:9: "And ye shall walk in His ways, they are the right and good path." The Torah ascribes certain attributes to God to inform Israel that they are "right and good." 2 Maimonides, supra note 94, at 632-38 (Part III ch.54).

154 See Kirschenbaum, supra note 137.

155 E. Urbach, supra note 36, at 156-67.

156 R. Nissim of Gerona, Derashot haRan, Eleventh Homily.

157 See Mekhilta, Mishpatim, Chap. 1 (246); Midrash haGadol, Mishpatim (Margulies ed. 454-55); Book of Jubilees 33:16-20; Z.H. Chayes, Torat Nevi'im 24-28b in 1 Kol Sifre Maharatz Chayes chap. 11, 71 (1958). See generally 6 L. Ginsberg, The Legends of the Jews 259 n.275 (1968).

158 Babylonian Talmud, Sanhedrin 56b; see also Babylonian Talmud, Horayot 8b; *Rashi*, commenting on Exodus 15:25 (identifying the laws given at Marah with the seven Noahide laws, the laws of the red heifer, the laws of Sabbath and the laws of *dinin*). The revelation at Marah is the beginning of the process of the Sinai revelation since this revelation, unlike prior revelations, was only to Israel. See Potolsky, The Rabbinic Rule "No Laws are Derived From Before Sinai" (Heb.), 6 Dine Israel 195, 213-15 (1975).

cluded a set of rules known as *dinin* when the command of *dinin* already is part of the Noahide laws also given at Marah. One opinion identifies the second set of rules with the special procedural and evidentiary rules of the Sinaitic Code: two corroborating witnesses, prior warning and a court of twenty-three.[159] The interpretation implies that, before giving the full corpus of law to Israel, God provided procedural leniencies concomitant with the increased obligations contained in the Sinaitic Code.[160] This rabbinic interpretation may be read as a metaphorical restatement of the ethical basis of the Torah. The Torah is a system of obligations undertaken out of devotion and love of God rather than a system of coercion. Accordingly, with the giving of the numerous commandments, the Torah also limits human enforcement mechanisms.

Sometimes the election at Sinai and the giving of the new laws of procedure and punishment are ascribed by the *Aggadists* to Israel's supposed moral fitness and peace-abiding character as compared with that of the rest of the nations of the world. A popular narrative recites that the pagan nations refused to accept the Torah offered them by God after learning of one or another Noahide prohibition contained in it. Thus, the *Midrash* reasons, since the pagan nations of the world were unable to keep even the minimum set of behavioral norms given to Adam and Noah, they could not be entrusted with the myriad and detailed obligations set forth in the Torah.[161] The *Midrash* implies that conventional methods of adjudication and enforcement

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159 If Urbach's analysis of the term "*dinin*" in talmudic Hebrew is correct, see supra note 55, these rules logically should refer to matters of judicial procedure. While not all the talmudic opinions identify the additional laws of *dinin* given at Marah with the two-witness rule or rule of prior warning, the other opinions also assume that the term *dinin* here refers to matters of judicial procedure. Thus, one opinion identifies the new laws of *dinin* with the laws of fines; another with the obligation to establish courts. Babylonian Talmud, Sanhedrin 56b. Other *Midrashim* comparing the laws of "*dinin*" of the Noahide and Sinaitic Codes also imply that the difference in the two laws is the details of judicial procedure. Midrash Tanhuma Shofetim 1:1; Mishpatim 21:1 (Buber rescension); Midrash haGadol, Deuteronomy 369 (Fisch ed.).

Rashi also appears to identify the laws of *dinin* given to Israel at Marah with the laws of judicial procedure. See *Rashi*, commenting on Exodus 15:25 and *Rashi*, commenting on Babylonian Talmud, Sanhedrin 56b. Nahmanides, however, identified the laws of "*dinin*" given to Israel at Marah with customs or regulations to guide Israel until the giving of the Torah. Nahmanides, supra note 54, commenting on Exodus 15:25. This is also consistent with Nahmanides's interpretation of the word *dinin* in the Noahide commandments as referring to a group of substantive laws. See supra note 59.

160 On the question whether the Noahide laws of procedure were entirely superseded by the giving of the new rules of procedure to Israel, see infra notes 190-204 and accompanying text.

161 Sifre Deuteronomy, nos. 343, 1426, at 396-97 (Finkelstein ed.); Leviticus Rabbah 13.2 (Margoliot ed.); see also Mekhilta Yitro 221-22 (Horowitz-Rabin ed.). For a collection of rabbinic sources on this theme, see 6 L. Ginsberg, supra note 157, at 30 n.181.

are not necessary in a peace-loving society, one that is committed to voluntary adherence to the law.[162] Only Israel, the *Aggadah* suggests, merits the special dispensation provided by the Torah's laws. These *Midrashim* should be read, of course, in light of their purpose, to justify the election[163] and increase Jewish self-definition, in the light of the setting of these narratives in conditions of political subjugation and in the larger context of many talmudic statements that compliment virtuous non-Jews.[164]

The ideas expressed in these narratives were all in the air in the time when the talmudic rabbis discussed and refined the details of the Noahide Code. While the details of the Noahide judicial system outlined in the *Book of Aggadah deBei Rav* may have been influenced by the biblical text of *Genesis* 9:5 or even Roman custom, the symbolic meaning for the rabbis of the Sinaitic judicial system provides a potent explanation for why the rabbis would not have imputed the Sinaitic model to the Noahide Code, in any event.

V. THE OBLIGATION OF JEWS TO PRESERVE SOCIAL ORDER

No legal system can sustain itself solely through the aspirational vision of law set forth in the Sinaitic Code. Although the Torah's model of judicial justice was intepreted as a sign of God's grace, a merciful and divine form of justice appropriate to Israel, rabbinic jurists did not entirely discount the need for more conventional methods of social control. While the rabbis left the Torah's model of judicial justice intact as an ideal, in the medieval period, in particular, jurists grappled with the question whether punishment could be imposed on Jews pursuant to more conventional models of judicial justice to maintain the legal and social unity of the Jewish community. The rabbis embraced other legal models within Jewish law to accomplish this goal. This section traces how the Noahide obligation of *dinin* served as a residual source of law for the rabbis from which the authority to waive Sinaitic procedure was derived.

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[162] The theme that pagans neglected to keep even the minimum set of rules indispensable for life in civilized society, forfeiting their rights to protection under the dominant law (Torah law), appears in a few other contexts in the Talmud. Pagan lawlessness is cited to justify a Mishnaic rule that gives Jews legal protection against injury to property by the noxal action of a beast owned by a non-Jew, but denies non-Jews recourse for similar injury by an animal belonging to a Jew. Babylonian Talmud, Baba Kamma 38a. For discussion of the story of Roman objection to this rule after declaring Jewish law otherwise "good and fair" (*bonum et aequem*) see B. Cohen, supra note 15, at 24-25.

[163] Urbach, supra note 14, at 472-74, attributes this *Aggadah* to Jewish-Christian argument in the first centuries.

[164] For a description of the virtues ascribed to non-Jews by the Talmud, see S. Lieberman, supra note 17, at 68-90.

A. *Rabbinic Attitudes to Conventional Methods of Criminal Adjudication*

The Talmud did not speak in one voice about the merits of the Torah's idealized form of justice. There are legal and *Aggadic* discussions about the benefits of more effective methods of criminal adjudication even in the tannaitic period.[165] The famous debate of R. Simeon ben Gamliel with R. Akiba and R. Tarfon is illustrative. The latter two asserted that no executions would take place if they sat in judgment. Presumably, stringent application of the evidentiary rules would allow evasions of the death penalty. R. Simeon ben Gamliel retorted that this "would multiply spillers of blood in Israel."[166] R. Simeon ben Gamliel's position, echoed in other rabbinic passages,[167] is that it is just to enforce the death penalty against a proved murderer because it is ultimately merciful to the community. Many *Aggadot* question whether refraining from executing a murderer is a perversion of God's directive to man and a "superficial understanding" of the divine quality of mercy.[168] One *Aggadah* admonishes, "do not be more righteous than your Creator."[169] Another asserts: "They do not do right who turn God's attributes into mercy."[170] These debates largely question how stringently to apply the Sinaitic rules so as to free the accused. But the Talmud also records a few instances in the tannaitic period when punishment was meted out to Jews who committed egregious crimes, such as witchcraft, without resort at all to the two-witness rule or rule of prior warning. The Talmud describes these punishments as emergency measures not commanded by Scripture but necessitated by the exigencies of the hour.[171]

Yet, if the talmudic approach to conventional methods of enforcing social norms is ambiguous, the medieval attitude is clearer. To preserve communal unity and continued adherence to religious law in its entirety, the Jewish community must have the ability to impose corporal and even, on occasion, capital punishment. The Torah's vision of judicial justice is an ideal to strive for. But the Torah also must have made provision for a more conventional form of justice

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165 Blidstein, supra note 140, analyzes the talmudic debate thoroughly.

166 Mishnah, Makkot 1.10.

167 See, e.g., Babylonian Talmud, Makkot 7a (where the rabbis refuse to apply the laws of evidence strictly so as to prevent any executions).

168 Blidstein, supra note 140, at 167.

169 Ecclesiastes Rabbah 7:16.

170 Palestinian Talmud, Berakhot 5:3.

171 See, e.g., Palestinian Talmud, Makkot 1:10; Babylonian Talmud, Sanhedrin 37b; Yevamot 89a-90b; see also Babylonian Talmud, Sanhedrin 46a (recording the opinion of Eliezer ben Jacob that the court may waive Sinaitic procedure not with the intention of disregarding the Torah but in order to safeguard it).

when the needs of Jewish society require it.[172] The aspirational approach to criminal adjudication so eloquently articulated in the Talmud may have been less compelling in the medieval period for a variety of reasons. Medieval jurists generally seemed sympathetic to the instrumental use of law.[173] New provisions for government of the Jewish community in light of the seemingly permanent loss of all forms of traditional criminal jurisdiction was required in any event. The phenomenon of Jewish informers, who posed a vivid threat to the entire Jewish community, also played a significant role in medieval Jewish political thought, especially in Spain.[174] The variety of penalties imposed by religious communal leaders in the middle ages without regard to Sinaitic procedure is well-documented. At the same time, medieval rabbinic authorities did not perceive themselves as innovators. From the internal viewpoint of Jewish law, any authority exercised, no matter how pressing the historical circumstance, first must have a legal basis in Scripture. Thus, medieval and later jurists struggled to articulate where in the Jewish legal structure the power to punish Jews according to a more effective model of criminal adjudication was located.

Although the Talmud did not describe the reported instances of extralegal punishment as an actual, developed system of judicial jurisdiction, later authorities understood this tradition as establishing the legal basis for a systematic exercise of rabbinic "emergency" powers.[175] With the dissolution of the Sanhedrin, several jurists held that these powers could be exercised by the Exilarch and religious communal leaders.[176] Maimonides asserted that the Jewish monarch could impose capital punishment on criminal offenders without resort to the

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172 R. Nissim of Gerona, Derashot haRan, Eleventh Homily. See Blidstein, supra note 147, at 55-56 (1980). Blidstein points to a parallel medieval Islamic debate about the power of the calif to violate the ideal law of the *shari'ah* with respect to the requirements of witnesses.

173 Compare Saadya Gaon, Beliefs and Opinions 10:13; 9:1 (espousing a retributive theory of justice) with 2 Maimonides, supra note 94, at 536 (part III ch.35) (arguing that penal laws are justified both as a general and as a specific deterrent and suggesting that mercy must apply to society as a whole, not solely to the individual accused). On Maimonides's view of the need for law to control the rapacious instincts of man, see supra note 94.

174 R. Solomon Ibn Adret's famous responsum dealing with the remittance of Jews to the Spanish authorities, cited infra text accompanying note 184, addresses the situation of Jewish informers. See generally D. Kauffman, Jewish Informers in the Middle Ages, 8 Jewish Quarterly Rev. 217 (1896); D. Biale, Power and Powerlessness in Jewish History 81 (1987).

Medieval responses to the problem of Jewish self-government were not uniform, of course. Perhaps the most dramatic response, by a community in the grips of messianic fervor following the Spanish exile, was the attempt in Safed in 1538 to reinstitute the chain of ordination and revive the biblical power to punish. For an account of this fascinating episode, see Cover, The Folktales of Justice: Tales of Jurisdiction, 14 Capital Univ. L. Rev. 179, 191-97 (1985).

175 Maimonides, The Code of Maimonides, Laws of Sanhedrin 18:6, 24:4.

176 See generally S. Assaf, supra note 16; 1 E. Quint & N. Hecht, Jewish Jurisprudence: Its

two-witness rule or rule of prior warning.[177] Others jurists held that the penal arm of non-Jewish governments could be called in to administer capital punishment to Jews either in accordance with the "king's justice" or the talmudic doctrine of *dina de-malkhuta dina* ("the law of the state is the law").[178]

The view that the Torah itself must have made provision for both forms of governance, the ideal and the conventional, is most clearly articulated by R. Nissim of Gerona in his famous Eleventh Homily. Basing himself in part on Maimonides's description of the judicial powers of the king, R. Nissim suggests that Jewish society requires two forms of governance: true justice represented by Torah procedural law, the concern of the Sanhedrin, and societal justice dispensed by the king. When the monarchy ended, R. Nissim asserts, its powers were transferred to the rabbinic courts exercising emergency jurisdiction.[179] The important point here, as a commentator on R. Nissim's political philosophy brings out, is that the emergency power to provide effective sanctions against those who breach the social order "must always be located somewhere within the Jewish social organism" for the community to thrive.[180]

Although the medieval practice and sentiment is clear, the legal basis of these opinions still is opaque. The Talmud addresses only the powers of rabbinic courts to waive Sinaitic procedure. R. Nissim holds, however, that the rabbinic courts' emergency powers derive from the powers of the monarch. Yet the assertion that the king can waive Sinaitic procedure is articulated for the first time by Maimonides.[181] Neither the biblical account of kingship nor the discussion of the monarchy in talmudic or cognate texts directly alludes to the historic power of the king to punish offenders without resort to the procedural rules of the Sinaitic Code.[182] The extension of the rule that

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Sources and Modern Applications (1980); A. Schreiber, supra note 136, Part II (documenting extraordinary punishments imposed by Jewish communal leaders in the medieval period).

177 See Maimonides, The Code of Maimonides, Laws of Kings, 3:10.

178 See Solomon Ibn Adret (*Rashba*), Responsum no. (see also in J. Caro, Beit Yosef, commenting on Jacob ben Asher, Tur Hoshen Mishpat, 388); S. Luria (*Maharshal*), Yam Shel Shlomo ch. 6, para. 14. For an analysis of the legality (according to Jewish law) of aiding non-Jewish criminal proceedings against Jews, see Bleich, supra note 2.

179 R. Nissim of Gerona, Derashot haRan, Eleventh Homily.

180 Blidstein, supra note 147, at 53.

181 Id. at 54.

182 Some commentators have grounded Maimonides's description of the king's judicial powers in various biblical accounts of monarchical dispensation of justice. See, e.g., B. Ashkenazi, Shita Mekubezzet, Baba Metzia 83b (basing the king's powers on the story of David and the Amalekite); Z. Chayes, 1 Kol Sifre Maharatz Chayes 20 (basing them on the story of David and the sons of Saul). See generally G. Blidstein, Political Concepts in Maimonidean Halakha (Heb.) 130 (1983).

the law of the state is the law to matters of punishment also seems contrary to the traditional assumption that the doctrine of *dina de-malkhuta dina* applies only to fiscal matters.[183] The scriptural authority to dispense with Sinaitic procedure has proved altogether elusive.

Consider the often-quoted responsum of R. Solomon Ibn Adret (*Rashba*), a fourteenth-century jurist. In an opinion permitting the remittance of Jews to the Spanish authorities, he wrote:

> This is in order to preserve the world. For if you issue decisions based exclusively on the law as given in the Torah, and rule in questions of torts and such only in accordance with this law, why then society would be destroyed, for we would need witnesses and forewarning. As the Talmud says, "Jerusalem was destroyed because they established their decisions only in accordance with biblical law.[184]

The *Rashba's* opinion does not cite scriptural authority. Instead, he bases the power to waive Sinaitic procedure on the principle of *tikkun olam*, the preservation of social order.[185] Earlier, Maimonides cited the need to preserve order in society as a justification both for the exercise of the rabbinic emergency powers[186] and for the king's power to dispense justice contrary to Sinaitic procedure.[187] Yet, the obligation to preserve order in society is not identified anywhere as one of the revealed commandments. The term "preservation of order in society" appears for the first time in Jewish law in the Mishnah. It is cited there to explain why the rabbis of the Mishnah adopted certain legislation addressed to social and economic needs.[188] The need to preserve order, in these contexts, is the reason for the legislation, not the legal basis for the legislation.[189] The obligation to preserve

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183 See Blidstein, supra note 147, at 57 n.23; see also discussion infra notes 218-19 and accompanying text.

184 Solomon Ibn Adret (*Rashba*), supra note 178.

185 In addition to the need to protect the social order, the *Rashba* seems to refer to the concept of *lifnim meshurat hadin* (beyond the measure of the law). This concept usually refers to an aspirational norm as opposed to a strict requirement of the law. See generally Lichtenstein, supra note 36. Here, *Rashba* appears to suggest that adherence to the letter of the law of criminal adjudication is not within the spirit of the law because it allows violence to go unchecked. A stricter application of the criminal laws would be more in keeping with the spirit of the law. See D. Novak, supra note 13, at 185.

186 Maimonides, The Code of Maimonides, Laws of Sanhedrin 18:6; 24:4.

187 Maimonides, The Code of Maimonides, Laws of Kings 3:10.

188 Mishnah, Gittin 4:2-5:3.

189 For example, according to the Mishnah, Gittin 4:3, the rationale for Hillel's famous *pruzbul* decree, allowing a creditor to avoid the moratorium on repayment of debts effective every seventh year, is the preservation of order in society. But most commentators assume that Hillel's authority to enact the pruzbul rests on the power of the rabbis to take money from

social order by punishing criminals without resort to the two-witness rule or the rule of prior warning is, of course, the essence of the Noahide commandment of *dinin*. But this commandment to maintain societal order through adjudication and enforcement is addressed ostensibly only to non-Jews; Jews were to aspire differently after Sinai.

B. *The Source of the Obligation of Jews to Preserve Social Order*

Two theses have been advanced recently that address the source of authority to waive Sinaitic procedure in administering punishment to Jewish criminals. Both theses relate this authority in different ways to a common source: the Noahide command of *dinin*. Rabbi Bleich argues, in an article in this volume, that two medieval jurists, *Rashi* and Maimonides, deduced a substantive obligation to preserve social order, a counterpart to the Noahide obligation of *dinin*, in the Sinaitic Code. It is an example, according to Rabbi Bleich, of grounding a substantive obligation solely in *sevarah* (reason)—a rare instance of "natural law" thinking in Jewish law. This substantive obligation derived purely from reason is, according to Rabbi Bleich, the basis for the authority of the civil state (in Jewish law) to punish Jews for crimes in accordance with the Noahide model of judicial justice.[190]

Rabbi Bleich's thesis, elaborated below, should be compared with that of the R. Moses Simhah haCohen of Dvinsk (Or Sameah), an early twentieth-century authority. The Or Sameah comments on Maimonides's depiction of the king's justice. Maimonides's presentation of the judicial powers of the Jewish monarch are virtually identical with the talmudic description of the Noahide criminal adjudicatory system.[191] Moreover, Maimonides places the laws governing Noahides within the section of his Code dealing with the laws of kings. The Or Sameah accounts for this by arguing that the powers of the Jewish monarch are derived directly from the Noahide command of *dinin*.[192] The Jewish king's judicial powers are a forthright extension of the provisions of the Noahide Code to Jews. There is an inexorable logic to this thesis. It flows naturally from the account of the establishment of the monarchy by the prophet Samuel in response

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one person and give it to another (*hefker bet den hefker*). *Rashi*, commenting on Babylonian Talmud, Gittin 36b.

190 Bleich, supra note 2, at 852-57.

191 For a detailed comparison, see Blidstein, supra note 182, at 131-34.

192 M.S. haCohen (Or Sameah), commenting on Maimonides, The Code of Maimonides, Laws of Kings 3:10. The Meiri, in the fourteenth century, also called attention to the connection between the talmudic description of the Noahide judicial model and the Maimonidean description of the powers of kings. Blidstein, supra note 182, at 131.

to the people's request to be "like all the nations."[193] The Or Sameah's thesis also implies that there is a more intricate analytic relationship in the Jewish legal structure between the pre-Sinai and post-Sinai legal orders than is ordinarily assumed. According to traditional Jewish legal doctrine, the Noahide Code is regarded as the legal order before Sinai that was superseded as a source of revealed law for Jews by Mosaic legislation.[194] According to the Or Sameah's thesis, however, the Sinaitic Code does not fully supplant the pre-Sinai legal order. Instead, the Noahide Code is a residual source of law for Jews.

The Or Sameah did not clarify why the Noahide Code might be viewed as the source of the Jewish king's power to waive Sinaitic procedure. He states only that "it is rational." Moreover, the Or Sameah explicitly extends the residual authority of the provisions of the Noahide Code only to two Jewish institutions: the monarch and the blood-avenger.[195] Unlike R. Nissim of Gerona, who held that the judicial authority inherent in the monarchy must be transferable to other Jewish legal institutions once the monarchy ended, the Or Sameah does not state whether other Jewish legal institutions have residual authority to implement the provisions of the Noahide Code.

Rabbi Bleich's thesis, by contrast, is not necessarily limited to the institution of the monarchy or its successors. If preservation of the social order is a substantive obligation of the Sinaitic Code deducible from reason, that obligation may be exercised by a variety of legal institutions. Indeed, Rabbi Bleich's conclusion that Maimonides must have deduced a counterpart to the Noahide obligation of *dinin* in the Sinaitic Code does not rest on Maimonides's depiction of the king's judicial powers. Rather, Rabbi Bleich derives it from Maimonides's holding, without any apparent scriptural authority, that rabbinic courts must provide judges for resident-aliens to assure compliance with Noahide law "so that the world will not be corrupted."[196] This substantive obligation devolves in this instance on the rabbinic courts.[197]

Another understanding of the source of authority to waive Sina-

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193 1 Samuel 8.

194 Maimonides, commentary on the Mishnah, Hullin 7:6. The proper interpretation of Maimonides's comments here and the general question of the analytic relationship between the pre-Sinai and post-Sinai legal orders in rabbinic thought deserve more scholarly attention. Potolsky, supra note 158, is a good start.

195 M.S. haCohen (Or Sameah), commenting on Maimonides, The Code of Maimonides, Laws of Murder 6:5. See generally D. Bleich, Capital Punishment in the Noachide Code in 2 Contemporary Halakhic Problems 341-67 (1983).

196 Maimonides, The Code of Maimonides, Laws of Kings 10:11.

197 See Bleich, supra note 2, at 854-55; Bleich, supra note 33, at 15-17.

itic procedure that draws on these two theses is possible. As noted earlier, the Talmud seems to view the Sinaitic procedural rules as leniencies or privileges. They are depicted as special dispensations from the prior, harsher, coercive legal order that were given by God to Israel upon acceptance of the Torah and in recognition, according to the *Midrash*, of Israel's voluntary adherence to the law and aspiration to judge like God. Did the rabbis view these privileges as revocable when the social condition of the Jewish community no longer merited them? While admittedly conjectural, I believe one can see the seeds of a doctrine traceable to the talmudic period suggesting that the Sinaitic and Noahide Codes are interactive and complement one another. Accordingly, the Noahide obligations can serve as a source of additional revealed law for Jews. In this view, the Sinaitic rules of procedure did not supplant the Noahide procedural model but rather supplemented it.[198]

The Noahide laws, according to Maimonides, are part of the tradition received by Moses at Sinai and are binding on non-Jews by virtue of their Mosaic authority. The Talmud assumes the Noahide laws were repeated at Sinai and, indeed, are binding on non-Jews after Sinai by virtue of this repetition.[199] This repetition of the Noahide laws is not usually understood, however, as binding on Jews in the sense of authorizing departures from Sinaitic law. But several *Midrashim* describe the relationship of the Noahide laws to Sinaitic law somewhat differently. According to these narratives, the Noahide laws were not only part of the tradition received by Moses at Sinai, but also the subject of an additional revelation to Israel. The Noahide commandments (including the Noahide command of *dinin*) were given directly to Israel at Marah prior to the Sinai revelation.[200] The Marah account implies that the Noahide laws are not only binding on non-Jews but also are additional revealed law given to Jews. Indeed, as noted earlier, one talmudic opinion suggests that the Sinaitic rules of procedure "were added to" the Noahide commandments at Marah.[201] These characterizations of the relationship of the Noahide and

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198 Cf. J. Engel, Beit haOtsar, Part I, Principle I, sec. 7,9 (1903): "[T]he Seven Noahide Laws are still incumbent upon us, drawing their authority from their pre-Sinaitic obligation. The Torah, which was later given to Israel, merely complemented the Noahide laws by revealing new commandments not yet given."

199 Babylonian Talmud, Sanhedrin 59a.

200 See supra note 158. One authority attributes the obligatory aspect of the Noahide commandments to this revelation. See Solomon ben Simon Duran (*Rashbash*), Responsum no. 543; see also Rakover, supra note 1, at 1082-83.

201 See supra notes 158-59 and accompanying text. The usual interpretation is that the Sinaitic rules of procedure are an express change of the prior Noahide model of judicial justice. See Frimer, supra note 15, at 91 n.2. This is in accordance with the talmudic principle: "When

Sinaitic Codes imply that plural forms of justice were given by God to Israel: the ideal justice of the Sinaitic Code and the more conventional form of justice represented by the Noahide Code. Thus, these *Midrashim* seem to lay the groundwork for the thesis implicit in later rabbinic opinions that the Noahide judicial model can be drawn on as a residual legal basis for imposing punishment on Jews "when the times require it."

This intricate relationship between the Noahide and Sinaitic systems of obligation is the subject of other legal discussion in the talmudic period. These discussions center on the question whether the apparent leniencies of the Sinaitic Code, as compared with the Noahide Code, are always supportable. For example, the Torah speaks of a man killing his fellow (implying a Jew). Nonetheless, killing a non-Jew is murder because the *Mekhilta*, a halakhic *Midrash*, says: "Prior to the giving of the Torah, we were enjoined with respect to bloodshed. After the giving of the Torah, our obligations must be more rigorous, not less so."[202] Elsewhere in the Talmud, this logical analysis is formulated as a conclusive legal principle couched in a rhetorical question: "Is there, then, anything which is permitted to the Jew but prohibited to the Gentile?"[203] There are two possible interpretations of this statement. The Talmud's remark may rest on reason. It is not logical to assume that God demands less of Jews than non-Jews. Even if scriptural counterparts to the provisions of the Noahide Code are not readily discernible in the Sinaitic Code, one may deduce, as Rabbi Bleich suggests, that they are in fact a part of the Sinaitic system of obligation. Or it may rest on the view that the Noahide commandments were given also to Jews and therefore can be seen as a source of additional obligations for Jews.[204]

The remainder of this section sketches how the theses outlined above provide a coherent account of the medieval rabbinic assumption that the Torah itself made provision for plural forms of Jewish government—the ideal and the conventional.

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the Torah was given the law was changed." Babylonian Talmud, Sabbath 135a-b. On the scope of this principle and the related question whether laws can be derived from "before Sinai," see Potolsky, supra note 158.

202 Mishpatim, Massekhta Dinezikin, iv 263 (Horowitz-Rabin ed.).

203 Babylonian Talmud, Hullin 33a; Sanhedrin 59a. Indeed, Tosafot argued that abortion is unlawful for Jews (although not a capital crime) based on this principle. Tosafot, commenting on Babylonian Talmud, Sanhedrin 59a, s.v. *laika*.

204 See Frimer, supra note 15, at 91-93 (especially n. 19).

C. *The Provisional Nature of The King's Justice and the Emergency Powers of Rabbinic Courts*

The authority of the king and the rabbinic courts to waive Sinaitic procedure is provisional. Neither the king's justice nor the emergency rabbinic powers are, at least theoretically, permanent jurisdictions. Maimonides asserts that the emergency power of rabbinic courts "to preserve social order" can be invoked only "when the times require it."[205] The court's emergency powers are not triggered by an individual act of aggression. The court's authority to punish must rest on a finding that the entire community is actually or potentially dissolute as a result of the individual's conduct.[206] Furthermore, the power to create "the exception"[207] does not include a power to establish precedents for the future.[208]

The provisional nature of the power of the rabbinic courts to waive Sinaitic procedure is, of course, implicit in the talmudic discussion. But Maimonides states that even a king's power to execute a murderer on the basis of the evidence of a single witness and without giving prior warning "for the purpose of preserving social order" is conditioned on the "exigencies of the hour."[209] Moreover, Maimonides does not suggest that Jewish monarchs are merely counterparts of non-Jewish political leaders. The king implements the Torah.[210] The king secures the first level of human goals the Torah addresses, the provision of civil security and physical welfare, so that the more comprehensive aims of Torah, the perfection of moral character and human intellect, can be achieved. The instrumental relationship be-

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205 Maimonides, The Code of Maimonides, Laws of Sanhedrin 18:6, 24:4.

206 Id. at 24:4.

207 The term is Carl Schmitt's in Political Theology: Four Chapters on the Concept of Sovereignty 5 (1985). The only one empowered to decide the exception, according to medieval commentators, is "the outstanding person of the generation." See 1 E. Quint & N. Hecht, supra note 176, at 185.

208 Maimonides, The Code of Maimonides, Laws of Sanhedrin 24:4.

209 Maimonides, The Code of Maimonides, Laws of Kings 3:10. Elsewhere, Maimonides sets forth the king's powers to dispense justice without specifying that it may be exercised only on an emergency basis. Maimonides, The Code of Maimonides, Laws of Murder 2:4. R. Yehuda Gershoni, Mishpat haMelukhah 96, tries to resolve this contradiction. He suggests that the king has discretion to impose the death penalty for criminal acts at all times but can only suspend the laws of evidence on an emergency basis. See D. Bleich, supra note 195, at 353-54 n.12.

210 [The king] is not a legislator or sovereign (since both of those roles belong in their primary senses exclusively to God) but at best an interpreter (and reformer) of the Law, i.e. one who sees to its application in various more or less concrete circumstances . . . . While the monarch is to be accorded great honor in keeping with his position, he himself must show respect to prophets and scholars, for his authority is not absolute but merely implementive of the Law.

Goodman, supra note 14, at 105.

tween the king and the goals of the law underscores the provisional nature of the king's emergency judicial powers.

Modern critics have suggested that Maimonides's emphasis on the temporal nature of these powers is designed to suppress doubts about the immutability of Torah law. Maimonides, one historian asserts, invests the rabbinic courts with broad judicial powers contrary to Torah law and disguises these adjustments in the law by describing them as provisional.[211] But this emphasis on the temporal limits of the judicial powers of the king and emergency rabbinic courts is in fact consonant with the theses outlined above that the Noahide obligation to preserve social order was viewed by the rabbis as a substantive obligation also of the Sinaitic Code. The thesis that the Noahide Code operates as a residual source of law for Jews explains why the judicial powers of the king were described by Maimonides as only provisional, a limitation at odds with traditional notions of monarchy. If the king's judicial powers derive from the Noahide Code, logically this residual jurisdiction may be exercised only when the social situation requires it. Moreover, Torah adjudication—the ideal—is a privilege, a special alleviation of the provisions of the Noahide Code granted to an essentially law-abiding community. This privilege of the post-Sinai legal order may be revoked, but only in times of social need. Thus, the provisional nature of the power of both the rabbinic courts and the king to waive Sinaitic procedure in fact highlights the continued commitment to the ideals of Torah law. The temporal limits are essential to mark out the limited scope given to the value of preserving social order. While, on the surface, the three jurisdictions—rabbinic emergency courts, the king and Noahide courts—follow similar methods of adjudication and law enforcement, they differ radically in meaning. In the Noahide legal order, the goal of preserving social order is the validating core of the system. In the Sinaitic

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[211] See Cohn, Maimonidean Theories of Codification, 1 Jewish L. Ann. 15, 34 (1978): Maimonides was fully aware of the effects of the change of times and of the fact that different norms and remedies may be required in different circumstances; so he invested courts with almost unlimited emergency powers, both judicial and legislative, apparently taking for his authority some isolated instances reported in the Talmud of extra-legal powers being assumed to meet emergencies (though he himself had earlier opined that no such emergency measures could ever give rise to legal norms). The powers thus vested in the courts included the temporary suspension of any provision of Written or Oral Law. Any contingency of changing times and circumstances was thus effectively provided for, without affecting the immutability of the law. It is because emergencies will not presumably occur in messianic times that the eternal validity of the law will in any event be vindicated in that glorious age.

legal system, this goal is subordinate; it is invoked only to sustain the more comprehensive aims of Torah.

D. *Noahide Dinin, Dina De-Malkhuta Dina and the Obligation to Preserve Social Order*

Maimonides, and R. Nissim after him, spoke only of the powers of the king and emergency rabbinic courts to dispense societal justice. While the latter's description of the law has been described as functionally "pragmatic" and "brutally realistic,"[212] R. Nissim (and Maimonides before him) confine their realism to sketching the function of Jewish legal institutions that will operate primarily in the messianic age. What happens when these emergency powers (which R. Nissim asserted must always be available) cannot be located in the Jewish "social organism" because the community has neither king, nor court, nor any legal autonomy? Can the Jewish community substitute non-Jewish governmental structures for the king and rabbinic courts? According to Rabbi Bleich, the talmudic principle of *dina de-malkhuta dina* ("the law of the kingdom is the law") is a grant of just such authority.

It is traditional to view the talmudic principle *dina de-malkhuta dina* ("the law of the state is the law") as an expression of ultimate political expediency. Jews, living on foreign soil, find a means to accommodate the pressing demands of a foreign and not always benign government.[213] The theoretical underpinnings of this legal principle are not explained in the Talmud. In the medieval period, jurists provided various rationales for the doctrine. One rests on a rudimentary social contract theory. Jews tacitly consent to aspects of foreign dominion as a condition of living within the bounds of a host country. Another assumes that non-Jewish kingship carries with it certain feudal rights that may be asserted against all who reside in the monarch's jurisdiction.[214] *Rashi* suggests, instead, that *dina de-malkhuta dina* is a logical corollary—a counterpart—of the Noahide command of *dinin*.

Rashi, according to Rabbi Bleich, interprets the Noahide obligation of *dinin* as a grant of authority to non-Jewish governments to

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212 Blidstein, supra note 147, at 52-53.

213 See, e.g., J. Katz, supra note 8; L. Landman, Jewish Law in the Diaspora: Confrontation and Accommodation (1968); G. Graff, Separation of Church and State: *Dina De-Malkhuta Dina* in Jewish Law 1750-848 (1985). For a systematic treatment of the doctrine, see S. Shilo, supra note 122.

214 See generally Povarsky, Jewish Law v. The Law of the State: Theories of Accommodation, 12 Cardozo L. Rev. 941 (1991).

enact their own systems of law.[215] Since non-Jewish legislation and adjudication fulfill the command of *dinin*, non-Jewish legal activity is a legitimate source of law for Jews. Moreover, non-Jewish legal activity can be relied on as a source of law even when it is at variance with Jewish law. As a later authority explains:

> Since [non-Jews] are obligated with *dinin* . . . these prescriptions are valid laws ("din"). And since these are valid laws, they are effective also within Jewish law even if the two [disputants] are Jewish . . . . This is not a result of the power of the king, but rather because of the obligation of *dinin* for which the Noahides were commanded. Accordingly, their governments may legislate laws and methods of acquisition, and they are effective between two Jews.[216]

Rashi's formulation of *dina de-malkhuta dina* clearly is not based on expediency. This is a blueprint for interaction between two sovereign legal systems.[217] His theory paves the way for incorporating non-Jewish institutions into the Jewish legal structure. In the context in which *Rashi's* statement is made, Jews can use methods of acquisition not otherwise recognized by Jewish law. So far, *Rashi's* theory is consistent with the traditional Jewish legal doctrine that the principle of *dina de-malkhuta dina* can be invoked only with respect to fiscal matters (*mammona*).[218] The Noahide obligation of *dinin*, however, also addresses the enforcement of social laws such as laws against bloodshed. These are treated as religious prohibitions (*issura*) in Jewish law, to which *dina de-malkhuta dina* usually is not applied. *Rashi* leaves open how far this seemingly limitless theory should be extended.[219]

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215 See Bleich, supra note 2, at 853-54; Bleich, supra note 33, at 17-19. The Mishnah permits a Jewish court to accept as valid between Jews certain civil instruments attested to by non-Jews in a non-Jewish court. Babylonian Talmud, Gittin 9b. The Talmud analyzed this rule as an instance of *dina de-malkhuta dina*. Babylonian Talmud, Gittin 10b. But since the process of attestation is not a law that the government itself requires of Jews, but rather a method of validation Jews sought to utilize for their own benefit (a method contrary to Jewish law), traditional explanations of *dina de-malkhuta dina* do not suffice to explain the Mishnah's position. *Rashi* cites to the Noahide command of *dinin* as a means of explaining why *dina de-malkhuta dina* might be applicable in the context of the Mishnah.

Rabbi Bleich contends that *Rashi's* theory rests on the conception of *dinin*, articulated more explicitly by Nahmanides, as a commandment to non-Jewish governmental institutions to create and adjudicate civil laws generally. Bleich, supra note 33, at 17-19.

216 H. Hirschenson, Malki Bakodesh, Responsum no. 2.

217 *Rashi* seems to treat the doctrine of *dina de-malkhuta dina* as a Jewish version of the full, faith, and credit clause. The judgments and legal actions of one jurisdiction are given legal effect in the other jurisdiction.

218 See Shilo, *Dina de-Malkhuta Dina*, 6 Encyclopaedia Judaica 53-54 (1972).

219 Perhaps, for this reason, few authorities have cited *Rashi's* thesis until the modern period. See, e.g., R. Simon ben R. Tzemah Duran (*Rashbatz*), Responsum I:158-62, who argued

There are other stresses in *Rashi's* theory. The perception that non-Jewish governments fulfill a divine duty when they engage in independent legal activity is, in essence, a rule recognizing the legitimacy of non-Jewish governmental law. Therefore, Jewish and non-Jewish legal orders may relate to each other as equal sovereigns and develop rules of reciprocity based on mutual respect and toleration (as the Meiri attempted).[220] R. Anatoli, for example, held that Jews must obey all laws of governments in which they reside when they do not contradict the rules of the Torah because these rules fulfill the command of *dinin*.[221] There is a logical leap, however, between the premise that other legal systems have dignity because they fulfill a religious duty and the conclusion that all laws of these sovereigns are laws also for Jews, even when Jewish law defines the obligations of Jews differently.

Others have attempted to resolve this difficulty by viewing the command of *dinin* as authority for turning to non-Jewish governmental law in the first instance. Since the activity of law-making, adjudication and enforcement is a fulfillment of God's command, the pronouncements of governments are in the category of "*dina*" (legitimate laws of the kingdom). But other theories will account for when foreign laws may be received into the Jewish legal system and when they may not. Several contributors to this volume suggest theories such as "interest analysis" or "consent" to provide the proper demarcation.[222] Rabbi Bleich attempts to resolve the stresses in *Rashi's* theory without resorting to another external theory by focusing first on the substantive obligation of Jews to preserve order in society. He notes that *Rashi* elsewhere assumes that it is permissible to hand Jews over to the criminal processes of the state, despite the obvious bypas-

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that if the rule of *dina de-malkhuta dina* could be invoked whenever non-Jews were enforcing Noahide *dinin*, Jewish law would be nullified. This opinion also is discussed in Rakover, supra note 1, at 1093-94.

220 R. Menahem haMeiri, a fourteenth-century Provençal authority, differentiated between non-Jewish nations of the talmudic period and his contemporaries. The contemporary non-Jewish nations founded on monotheistic religions, he held, are in compliance with Noahide law. Discriminatory rules against non-Jews in the Talmud, the Meiri concluded, were addressed to the idolatrous nations of talmudic times and must not be extended to contemporary non-Jews. See generally J. Katz, supra note 8, at 114-28. The Meiri's conclusion that non-Jewish governments routinely fulfill the Noahide obligations did not lead him, however, to the conclusion that Jews could use non-Jewish laws. He limited the application of the doctrine of *dina de-malkhuta dina* to the right of non-Jewish governments to impose taxes and customs. Id. at 128.

221 J. Anatoli, supra note 60, at 72a.

222 See Kirschenbaum & Trafinow, The Sovereign Power of the State: A Proposed Theory of Accommodation in Jewish Law, 12 Cardozo L. Rev. 925 (1991) (using interest analysis to resolve the problem); Povarsky, supra note 214 (invoking consent).

sing of Jewish evidentiary and procedural rules.[223] Therefore, he concludes that *Rashi*, like Maimonides, must have assumed that Jews, though not specifically commanded about *dinin*, nevertheless are obligated as a matter of reason to preserve social order in a fashion similar to non-Jews. Accordingly, when Jews lack the ability to enforce their own laws, as in the case of criminal adjudication, to preserve order "reason demands that they be bound by [non-Jewish] legislation"[224] or judicial enforcement procedures authorized by the command of *dinin*. Rabbi Bleich's analysis thus provides a limit on *Rashi's* broad formulation, one that is consistent with the logic that the Noahide command of *dinin* is a residual source of law for Jews. But whether *Rashi's* theory rests on reason or the view that the Noahide laws are a source of residual revealed law is a question for future analysis.

Rashi's approach to the talmudic dictum "*dina de-malkhuta dina*" thus bears little resemblance to the traditional view that the dictum is a concession to foreign rule—a response to the peremptory demands of non-Jewish governments that Jewish jurists would have preferred to keep at a distance. Recent scholarship provides a useful corrective to this traditional viewpoint by emphasizing the role of the principle *dina de-malkhuta dina* in securing and maintaining Jewish legal autonomy. Since the principle was invoked only after the rabbis first ruled whether the demands of the state were legitimate, *dina de-malkhuta dina* served to create boundaries between the state and the Jewish community, increasing the community's capacity to adhere to its own laws.[225] *Rashi's* approach to the talmudic dictum cuts even deeper into the traditional viewpoint. For *Rashi, dina de-malkhuta* is an instrument to transform civil authority into an arm of Jewish substantive law. *Dina de-malkhuta dina* is thus a substantive element of the Jewish legal system, a parallel to the political institutions of the king and the rabbinic courts. The principle is intended to serve needs that are internal to the Jewish community. Maimonides, with his fascinating mix of political realism and messianism, looked to the future when all the institutions of the Jewish constitution—king, prophet,

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223 Bleich, supra note 2, at 855-56 (citing *Rashi*, commenting on Babylonian Talmud, Niddah 61a, s.v. *Mehash leh miba'i*).

224 Id. at 855.

225 See generally Blidstein, A Note on the Function of "The Law of the Kingdom is the Law" in the Medieval Jewish Community, 15 Jewish J. Sociology 213 (1973); D. Biale, supra note 174, at 54-57. Both Blidstein and Biale argue that the principle of *dina de-malkhuta dina* was an affirmation of the sovereignty of the Jewish community even in exile. According to Biale, the principle was a crucial part of a developed political theory of Jewish self-government.

priest, court—would work in harmonious fashion to achieve the proper balance between the political and more spiritual elements of the Jewish legal system.[226] The focus of the talmudic rabbis in articulating the doctrine of *dina de-malkhuta dina* emerges as decidedly practical and this-worldly in *Rashi's* eyes. *Dina de-malkhuta dina* is talmudic political legislation for a community in exile. It is a means of substituting non-Jewish political institutions for Jewish institutions no longer capable of governing. At a time when Jews may lack political autonomy, *Rashi* seems to assert, they still have a functioning political institution. The foundation of this institution, too, is the Noahide command of *dinin*.

CONCLUSION

Contemporary legal scholarship often portrays law as a plurality of disparate and competing goals that defy synthesis.[227] One of the more exciting contributions to contemporary legal scholarship on pluralism in law is the late Robert Cover's description of two contrasting types of legal orders. In the 'imperial' legal order, epitomized by the civil community, the universal norms of the community are enforced by institutions in the interest of effective social control. In the 'paideic' legal order, members adhere to a set of common obligations with particularist meaning for the community out of commitment rather than coercion. The goal of the paideic legal order is the creation of a distinctive world of legal meaning; the goal of the imperial legal order is to maintain a world already created.[228] For Cover, these dual goals of law are in tension with one another, yet are interactive and interdependent. Law, he argued, is precisely the product of the tensions between these two modes of legal ordering. Thus, law is neither wholly conventional nor wholly utopian; it is rather the bridge between reality and an alternative ideal.[229]

The rabbinic conception of the Noahide and Sinaitic systems of law can be compared with the two types of legal orders described by Cover. The Talmud portrays the Noahide Code as a set of negative

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226 Cf. Goodman, supra note 14, at 107 (describing Maimonides's approach to the law as "impressive testimony to the confidence with which he looked forward to political conditions in the world which would make possible [the] restoration" of the government of Torah in concrete terms). For an account of Maimonides's "realistic messianism", see Funkenstein, supra note 4.

227 For an excellent summary of the role of pluralism in contemporary conceptions of law, see Weinrib, Law as a Kantian Idea of Reason, 87 Colum. L. Rev. 472, 474-78 (1987).

228 Cover, The Supreme Court, 1982 Term, Forward: Nomos and Narrative, 97 Harv. L. Rev. 4, 12-13 (1983).

229 Id. at 9. See also Cover, supra note 174, at 181.

duties—divine norms given to those who inhabit only a conventional political domain and have primarily an obligation to refrain from violence or social harm. The Sinaitic Code, by contrast, consists of the positive obligations of the members of a convenantal community undertaken out of commitment to and love of God rather than coercion. The Sinaitic judicial model is therefore portrayed in rabbinic thought as an ideal form of justice mirroring the true justice engaged in by God.

Rabbinic jurists also viewed these two types of legal orders as interactive. The goal of the Sinaitic Code is to create a strong and meaningful legal world, a paideic legal order that is inherently compelling. But once created, this world must be maintained over time.[230] This is the purpose of the Noahide commandment of *dinin*, according to medieval tradition. It is the obligation to preserve the world and secure social peace through legislation and conventional judicial enforcement of norms. One of the more powerful ways rabbinic tradition achieves a synthesis between these two distinct goals of law is by viewing the revelation at Sinai as not fully superseding or displacing the prior order. According to this strand of rabbinic tradition, the Noahide commandment of *dinin* is a source of residual obligation for Israel to preserve social order even after the revelation at Sinai. The Noahide commandment of *dinin* is that part of Israel's pre-Sinaitic legal past that is deemed to carry over into its post-Sinaitic legal life and bridges the conventional and more aspirational elements of the Jewish legal system.

A provocative attempt to connect the command of *dinin* with the political institutions of Jewish law can be found in the exegetical comments of the thirteenth-century rabbi, Anatoli. The command of *dinin*, R. Anatoli implies, is the critical link between the institutions of Torah and historical necessity. R. Anatoli states that the command of *dinin* is "more ancient and different from the other commandments of the Torah."[231] *Dinin* is a command given to all humanity prior to the Sinai revelation to establish the laws required at every era and every place for the existence of a state. R. Anatoli suggests that there

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230 To illustrate the difference between 'world-building' and 'world-maintaining' precepts, Cover cites the aphorisms of Simeon the Just and R. Simeon ben Gamliel regarding the three pillars on which the world stands. According to Simeon the Just, the world stands on the Torah, the Temple worship service and on deeds of kindness. Mishnah Avot 1:2. According to R. Simeon ben Gamliel, the world stands on justice, truth and peace. Mishnah Avot 1:18. R. Joseph Caro, Beit Yosef on Tur Hoshen Mishpat 1, attempts to reconcile the two statements. According to R. Caro, the three pillars of Simeon the Just are the forces necessary for the initial creation of the world; the three pillars of R. Simeon ben Gamliel are the forces necessary to preserve the world that already has been created. Cover, supra note 228, at 11-12.

231 J. Anatoli, supra note 60, at 71b.

are many laws left out of the Torah but mentioned in the Talmud without indication of their legal source or explanation of their derivation. These laws, like others more explicitly revealed, are part of God's "ancient" command of *dinin*. This command of the pre-Sinaitic legal order was not superseded at Sinai. The command extends to Israel's post-Sinaitic life and is a residual source of authority for Jewish leaders to articulate laws suitable for the needs of the time and the particular circumstances of the people. "It was thus even after the Torah had been given in matters not expressly commanded; it was for the judges to establish rules of justice for the proper conduct of the State, as is the custom among the nations."[232]

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[232] Id. at 72a.